UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff for cause of action alleges:

1. This action arises under the Constitution of the United States; the court has jurisdiction pursuant to Title 28, United States Code, Section 1343, subparagraph (3).

2. Plaintiff Vance Hartke was the Democratic candidate for reelection to the office of United States Senator from Indiana at the general election held November 3, 1970; defendant Richard L. Roudebush was the Republican candidate for election to said office at said general election.

3. On November 16, 1970, the Secretary of State of Indiana, pursuant to the provisions of Burns Ind. Stat. Ann. Section 29-5309, certified the returns of said election showing the plaintiff Hartke to have the highest number of votes for the office of United States Senator.

4. On November 17, 1970, defendant Roudebush, purporting to act under and pursuant to the provisions of Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, filed a petition for recount of the votes cast in said general election for United States Senator in 137 precincts of Marion County, Indiana. Said petition for recount was filed in Superior Court No. 3 of Marion County, Indiana and docketed as Cause No. S 370-1177. A copy of said petition is attached hereto as Exhibit "A".

5. On November 19, 1970, plaintiff Hartke filed in said action a motion to dismiss on the ground that said court lacked jurisdiction over the subject matter of the action; a copy of said motion is attached hereto as Exhibit "B".

6. On December 1, 1970, the Superior Court of Marion County Room No. 3 entered an order overruling plaintiff's motion to dismiss. A copy of said opinion and order is attached hereto as Exhibit "C".

7. Thereafter, on December 1, 1970, said court entered an order for a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970, appointed defendants Samuel J. Walker, John R. Hammond and Duge Butler as a recount commission, and ordered said commission to convene and commence a recount on December 8, 1970. A copy of said order is attached hereto as Exhibit "D".

8. Those provisions of Indiana law contained in Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, insofar as they purport to authorize and establish a procedure for a recount of the votes for the office of United States Senator, conflict with the provisions of Article I, Section 5 of the Constitution of the United States, which provides that "Each house shall be the judge of the elections, returns, and qualifications of its members . . ."

9. If not restrained and enjoined, defendants Samuel J. Walker, John R. Hammond and Duge Butler, acting under color of state law, will convene and commence a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970 in said precincts of Marion County, thereby depriving plaintiff of the rights, privileges and immunities secured to him by Article I, Section 5, of the Constitution of the United States. If not restrained and enjoined, defendant Roudebush, acting under color of state law as aforesaid, will seek to use and utilize the machinery and procedures provided in said statutes, in pursuing a recount in Marion County and elsewhere in the State of Indiana, and in challenging before the recount commission the determinations of precinct election boards heretofore made as to what ballots should be counted or not counted, as the case may be.

WHEREFORE, plaintiff prays:

1. That a three judge district court be designated, pursuant to the provisions of Title 28, United States Code, Section 2284, to hear and determine this action.

2. That an interlocutory injunction issue from and out of this court, restraining the defendants Samuel J. Walker, John R. Hammond and Duge Butler from convening and commencing a recount and restraining and enjoining Richard L. Roudebush from taking any actions to effect recount procedures under the aforesaid laws of the State of Indiana, pending final determination of this action.

3. That the court determine and declare said laws of the State of Indiana to be unconstitutional insofar as they purport to provide the machinery and procedures by which

a recount of votes in an election for the office of United States Senator shall be conducted; and that the court permanently restrain and enjoin the defendants and restraining and enjoining the defendants Samuel J. Walker, John R. Hammond and Duge Butler from convening and commencing a recount, and the defendant Richard L. Roudebush and all persons acting in his behalf or in concert with him from taking any further action to use said machinery and procedures to carry forward a recount of the vote for the office of United States Senator in the general election of November 3, 1970.

4. For such other and further relief as may be proper.

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Attorneys for Plaintiff

IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH, Petitioner	)	
vs.	)	CAUSE NO: S370-1177
R. VANCE HARTKE, Defendant	)	

PETITION FOR RECOUNT OF VOTES AND FOR CONTEST OF ELECTION WITH RECOUNT OF VOTES

I.

Richard L. Roudebush, petitioner in the above entitled cause, after being duly sworn upon his oath, hereby alleges and says:

1. That on the 3rd day of November, 1970, there was held a general election in the State of Indiana in which the public office of Senator in the Senate of the United States was voted upon in all precincts of all Counties of the State of Indiana, including all of the precincts of this County of Marion.

2. That petitioner was a candidate for said state elective office of membership as a Senator in the Senate of the United States at said election.

3. That R. Vance Hartke was the candidate opposing petitioner for said office at said election, and that petitioner and the said R. Vance Hartke were the only candidates for said office at said election.

4. That the post office address of R. Vance Hartke is 850 Dexter Street, Evansville, Indiana, and, that the post office address of petitioner if Rural Route 3, Noblesville, Indiana.

5. That petitioner desires a recount of all of the votes cast for the said office of Senator from and of the State of Indiana in the Senate of the United States at said general election in the Following precincts of this County of Marion, in all of which precincts the said office was voted upon:

1ST WARD; Precincts 5 and 6; 2ND WARD, Precinct 1, 3RD WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8 and 9; 4TH WARD, Precincts 3, 7 and 8; 5TH WARD, Precincts 1 through 8, all inclusive; 6TH WARD, Precincts 1 through 9, all inclusive; 7TH WARD, Precinct 2; 8TH WARD, Precinct 5; 9TH WARD, Precincts 2, 4, 6 and 7; 10TH WARD, Precincts 1, 6, 10 and 11; 11TH WARD, Precincts 1, 2 and 4; 12TH WARD, Precincts 1, 6, 7 and 8; 13TH WARD, Precincts 2, 3, 5, 6, 8 and 9; 14TH WARD, Precinct 4; 15TH WARD, Precincts 3 and 4; 16TH WARD, Precincts 1, 2, 4, 6, 7, 9 and 10; 17TH WARD, Precincts 2 and 3; 18TH WARD, Precinct 15; 19TH WARD, Precincts 5 and 12; 20TH WARD, Precincts 1, 5, 10 and 11; 22ND WARD, Precincts 2, 4, 6, 10 and 14; 23RD WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; 24th WARD, Precincts 5, 6 and 7; 25TH WARD, Precincts 2, 3 and 6; 26TH WARD, Precinct 1; 27TH WARD, Precincts 8, 16, 17 and 18; 28TH WARD, Precincts 5, 10, 11, 17, 18 and 24; 29TH WARD, Precinct 1; 30TH WARD, Precincts 4, 5, 7 and 8; Center Township, outside, Precinct 3; Decatur

Township, Precincts 4, 9 and 12; Franklin Township, Precinct 3; Lawrence Township, Precincts 15, 17, 23 and 24; Perry Township, Precincts 3 and 27; Warren Township, Precincts 3 and 30; Washington Township, Precincts 12, 20, 22, 36 and 37; Wayne Township, Precincts 10, 14, 16, 24, 34 and 35.

6. That the petitioner in good faith believes that either through mistake or fraud the votes cast for such office of said election in the precincts specified in Rhetorical Paragraph 5 of this Petition were not correctly counted and returned.

7. That this petitioner desires to contest said election in respect of said office.

WHEREFORE, petitioner prays that this Court grant this Petition; that this Court approve the petitioner's undertaking with corporate surety filed herewith for the payment of all costs of the recount of votes requested in his petition as sufficient undertaking for the payment of all costs of the recount requested in this Petition; that this Court, upon the expiration of twenty five (25) days after the said general election held on November 3, 1970, order the recount of all votes for said office cast at that election in all precincts in this County of Marion specified in Rhetorical Paragraph 5 of this Petition; that on said date, this Court appoint a commission of three (3) qualified members to make the recount ordered; that this Court order all of the ballots and voting machines used at such election for casting votes for said office impounded and provide for their protection, together with all tally sheets relating thereto, and all voters poll lists used in said Election and all registration records of said precincts containing the names and addresses of all persons registered by Clerk as having voted at said election, and order the same made available to said commission; that this Court order

the said recount commission to make and sign its certificate, upon completion of the recount, showing the total number of votes received by each of said candidates; for said office in said general election in the said precincts, and by what plurality, and file the same with the Clerk of the Marion County Superior Court, and that the said Clerk of such Superior Court thereupon determine the difference if any, from the votes tabulated by the County Canvassing Board, and certify the corrected total vote in this County for said office for each of said candidates to the Secretary of State of Indiana; and that the Court grant all other relief proper in the premises.

/s/ RICHARD L. ROUDEBUSH

Richard L. Roudebush, Petitioner

STATE OF INDIANA)
)
COUNTY OF MARION)

The undersigned, Richard L. Roudebush, having been duly sworn declares and says that he is the petitioner therein and that he has read the above and foregoing Petition, and that the facts alleged therein are true, to the best of his information and belief.

/s/ RICHARD L. ROUDEBUSH

Richard L. Roudebush, Petitioner

Subscribed and sworn to before me this 17th Day of November, 1970.

/s/ JANICE LOUISE SCHUMACKER

Notary Public

My Commission Expires:
October 23, 1973

IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH,)
)
Petitioner)
)
vs.) CAUSE NO:
) S370-1177
R. VANCE HARTKE,)
)
Defendant)

MOTION TO DISMISS

The defendant, R. Vance Hartke, by counsel, moves to dismiss the petition of Richard Roudebush, pursuant to TR 12, Indiana Rules of Procedure, for the reason that the court lacks jurisdiction over the subject matter of this action.

Defendant respectfully moves the Court to accelerate hearing on this motion because of the public interest herein.

/s/ JAMES L. TUOHY
Attorney for Defendant
R. Vance Hartke

Dated: November 19, 1970

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

I.

STATEMENT OF FACTS

Senator R. Vance Hartke, defendant, was a candidate for re-election to the United States Senate from Indiana at the election held November 3, 1970, and was certified by the Secretary of State on November 16, 1970, as the duly elected candidate. Since that time, the defeated candidate has filed a petition for a recount in this Court, which petition is incorporated by reference.

II.

LEGAL PROPOSITION

The United States Constitution states in part:

> "Each house shall be the judge of the elections, returns and qualifications of its own members . . ."
>
> Article I, Section 5,
> United States Constitution

This provision of the United States Constitution is identical in intent with the Indiana Constitution which reads:

> "Each house, when assembled, shall . . . judge the elections, qualifications and returns of its own members . . ."
>
> —Article 4, Section 10,
> Indiana Constitution

1. *Indiana Law.* The Indiana State Supreme Court has had before it on numerous occasions the question of

whether each house was the judge of its own elections or whether such elections were subject to a recount as provided by statute. The Indiana Court has in all cases held such recount statutes did *not* apply to legislative offices. See *Acker v. Reeves,* 229 Ind. 126, 95 N.E.2d 838 (1951); *Beaman v. Pike County Circuit Court,* 229 Ind. 190, 96 N.E.2d 671 (1951); and *Batchelet v. DeKalb Circuit Court,* 229 N.E.2d 798 (1967).

The Supreme Court in *Acker v. Reeves* used clear language to state that the legal principle of separation of powers that precluded a recount for state legislative offices was equally applicable for elections for the United States Senate and Congress. The Court speaking unanimously through Judge Gilkison said:

> "With respect to contesting the election of a member of the General Assembly the Indiana Constitution provides as follows:
>
> 'Each House, when assembled, shall . . .; judge the elections, qualifications, and returns of its own members; . . .' Art. 4, 10 Indiana Constitution.
>
> Art. 1, 5 United States Constitution is a similar provision for members of the Congress.
>
> In the light of these constitutional provisions this court, speaking by Shake, J. in *Lucas v. McAfee* (1940, 217 Ind. 534, 539, 542, 29 N.E.2d 403, 29 N.E.2d 588, among other things, said:
>
> 'The right of legislative bodies to judge the elections qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth . . .'
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law

> of every state in the Union in language substantially if not identically like that employed in ours. . . . The right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. *Dinan v. Swig* (1916), 223 Mass. 516, 112 N.E. 91."

The above quotation correctly states the deference which all the courts of the state must have for the constitutional provision quoted. See Anno. III, State Legislature, 107 A.L.R. 209."

Our Supreme Court concluded with:

"Sections 324 and 325 (Burns Ind. Stat. Ann. Sec. 29-5401—5402) of this act seem to be an effort on the part of the legislature to grant a right to a recount of the votes for a legislative office. However, the Constitution is the fundamental law of the state. As heretofore noted it expressly grants jurisdiction in this matter with respect to its own members to each house of the General Assembly when assembled. It thereby effectively excludes jurisdiction from the courts." *Ackers v. Reeves,* 229 Ind. 126, 95 N.E.2d 838

Six weeks after the *Acker* decision, Chief Justice Bobbitt, in the Supreme Court Case of *Beaman v. Pike County Circuit Court,* cited above, specifically declared that the statute authorizing a recount (basis of petitioner's action herein) for legislative offices was unconstitutional:

"To the extent that Art. 27, supra, purports to grant to the courts the power to determine the election,

qualifications and returns of members of the Legislature *it is unconstitutional* and of no force and effect." *Beaman v. Pike County Circuit Court,* 96 N.E.2d 671 at 674 (Emphasis added)

The Article 27 referred to by Judge Bobbitt above is Article 27 of the Acts of 1945, Ch. 208 and contains Secs. 324 through 340 of such chapter. In this case Petitioner's petition for recount is brought pursuant to such Article 27 (Burns Indiana Statutes Annotated, Secs. 29-5401—29-5417)(1969 Repl. Vol.))

An Indiana trial court that is without jurisdiction over a recount for a state legislative seat would hardly have jurisdiction over a recount for the office of United States Senator. The relief of petitioner, if any, lies with the United States Senate.

2. *Other jurisdictions.* Other jurisdictions follow the same principles. See:

Laxalt v. Cannon, 397 P.2d 466 (1964), Nevada
McLeod v. Kelly, 7 N.W.2d 240 (1952), Michigan

The *Lexalt* case denied a state contest for the office of United States Senator. A congressional election in Michigan was the subject matter of the *McLeod* case. In both cases, the respective courts held the United States Senate and House were the judges of their members, not the courts.

III.

RELIEF

Wherefore, defendant prays this honorable court grant this motion to dismiss.

Respectfully submitted,

/s/ JAMES L. TUOHY

Attorney for Defendant

Dated: November 19, 1970

Of Counsel:

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IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH, Petitioner	)	
vs.	)	CAUSE NO: S370-1177
R. VANCE HARTKE, Defendant	)	

Opinion, Finding & Ruling on Motion to Dismiss

OPINION

The question raised in the Motion to Dismiss is: Do the Acts of the legislature providing for recount apply to legislative offices? Is the Act, providing for recounts, unconstitutional insofar as they attempt to apply to legislative offices, state or national?

The Act in question presently, and as originally written, provides for "all candidates for any township, town, city, municipality, county, district, judicial, legislative, and state elective office and candidates for membership in the House of Representatives and in the Senate of the United States" (Burns Indiana Statutes, 1969 Replacement, Volume 7 of Part 1, Section 29-5402). The Act further provides that the candidate requiring a recount of votes "shall file a verified petition or petitions therefor, as the case may be, in the Circuit *or in a Superior court* of the

county or counties in which is located or are located the voting precinct or precincts in which he desires a recount of the votes cast for the office for which he or she was a candidate at such election . . ." (Burns Indiana Statutes 1969 Replacement, 29-5403).

The Superior Court, therefore, has jurisdiction of the recount, although it does not have jurisdiction for contest, this being specifically limited to the Circuit Court. (Burns Indiana Statutes, 1969 Supplement, Volume 7, Part 1, 29-5404), and this is an action solely for recount.

Decisions cited in the defendant's brief in support of the Motion to Dismiss principally are *State ex rel Acker vs Reeves, 229 Ind. 126,* 95 N.E.2d, 838, *State ex rel Beaman vs Pike County Circuit Court, 229 Ind. 190,* 96 N.E.2d, 671 (1951) and *State ex rel Batchelet vs Dekalb Circuit Court,* 229 N.E.2d, 798 (1967).

The last named case, State ex rel Batchelet, has a different factual situation in that the Indiana Senate upon convening following the election already had resolved the election dispute in favor of the Senator-elect as, recorded in the Indiana Senate Journal of 1965, and Mr. Batchelet performed the duties of Senator in the 1965 General Assembly. This case is of moment only in that it cites with approval *Acker vs Reeves,* supra.

In the *State ex rel Acker vs Reeves,* supra, this court is aware that Justice Gilkison applied the rather universally recognized principle that legislative bodies have the right to judge the elections, qualifications and returns of their own members.

Justice Gilkison properly observed that the constitution is the supreme law that effectively controls legislatures, congresses, executives and courts of the people. In constru-

ing the Acts of 1945, Chapt. 208, Section 324 and 325, he commented: "Section 324 and 325 of this Act seem to be an effort on the part of the legislature to grant a right to a recount of the votes for a legislative office. However, the Constitution is the fundamental law of this state. As heretofore noted, it expressly grants jurisdiction in this matter with respect to its own members to each house of the General Assembly when assembled. It therefore effectively excludes jurisdiction from the courts". (p. 130)

Of course, this decision is based on the separation of powers between the executive, the judicial and the legislative branches of the government.

The latter case of *State ex rel Beaman vs Circuit Court of Pike County,* supra, had the same question under consideration and arrived at this same general conclusion, citing *State ex rel Acker vs Reeves.*

In disposing of an important second question raised in *State ex rel Beaman*, supra, to wit: that a recount of the votes is not an adjudication of election or rights to an office, but is only a proceeding in discovery, Justice Bobbitt cited the provisions of the statute *then prevailing* in 29-5414 to this effect,

> ". . . When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such pricinct or precincts by each candidate for such office or offices and state therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificates in the order-book of such court. *Such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such certifi-*

cates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other proceeding in which there is an issue as to the votes cast at such election for such office or offices''. pp. 294, 195.

In resolving this question, Justice Bobbitt determined that since the recount certificates *superseded for all purposes* all previous returns, then the result could be a determination by the Circuit Court of the returns of an election of a member of the legislature. This would be in effect in contravention of the separation of powers. It would result in the granting to the courts the power to determine the elections, qualification and returns of members of the legislature, and under these conditions it would be unconstitutional and of no force and effect.

Since the *State ex rel Beaman vs Pike County Circuit Court*, the legislature in 1961 amended the Acts of 1945 to provide as follows: *''Except for the offices of governor, lieutenant-governor, and members of the general assembly,* such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; and certified copies of such recount certificates shall be prima facie evidence of the votes cast for such office or offices in such precinct or precincts in any contest or other preceeding (proceeding) in which there is an issue as to the votes cast at such election for such office or officers. . . *The said certified statements of the clerks of the circuit courts shall not be construed as determining the eligibility of a candidate for office, but shall be prepared and transmitted as herein provided for the purpose of referring the information therein contained to the appropriate authorities.''* Burns Indiana Statutes Volume 7, Part 1, Section 29-5414 at page 202 in said replacement.

This amendment, in the opinion of this court, removes from the superseding part of the statute the offices of governor, lieutenant-governor and members of the General Assembly and was an obvious intent to correct the constitutional defect originally in the 1945 Act, as pointed out in *State ex rel. Beaman vs Pike County Circuit Court*, supra.

It is the considered opinion of this court that the net effect of the '61 amendment effectively retains the right of recount as to the members of the legislature, and this would include the U. S. Senate, and simply is an aid of the powers exclusively granted to the legislature, state or national. It is in aid of, not in derogation of the powers of the legislature, and simply provides information upon which the legislature or Congress can make its own decision as to the qualifications and returns of its members. It, therefore, is not an unconstitutional invasion of their exclusive powers to judge the qualifications and returns of their own members.

The general election of 1970 was held exclusively under and pursuant to the election laws of this state. The state election board thereunder is "vested with the power, and charged with the duty of supervising *all elections and administering the election laws of this state* in their statewide application and especially *as they relate to federal and state elective offices.*" Burns Ind. Stat. Ann. Vol. 7 Part 1 (1969 Suppl), Sec. 29-3004.

Every precinct board, official, county-election boards and every voter participated under and were exclusively controlled by the election laws of this state. The registration of voters, the method of operating the election, the casting and counting of ballots from the opening of the

polls to their closing (and prior thereto in the case of absent voters)—all were under the exclusive provisions of the laws of this state. No other provisions and no Federal Statutes applied.

The office of Senator of the United States was one contested for under these same laws, rules and regulations. Insofar as they do not conflict with the Federal or State Constitutions they are applicable to any question raised as to the conduct and results of the election.

FINDING AND RULING

And, under the reasoning herein, the Court now finds no conflict with the Federal or State Constitutions.

IT IS THEREFORE THE FINDING AND JUDGMENT of this Court that the Motion to Dismiss be and is hereby overruled.

/s/ G. W. FUNK

Judge

IN THE SUPERIOR COURT OF MARION COUNTY
ROOM NO. 3

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

RICHARD L. ROUDEBUSH,)
)
Petitioner)
)
vs.) CAUSE NO:
) S370-1177
R. VANCE HARTKE,)
)
Defendant)

Comes now the Court at 3:00 P.M. E.S.T., December 1, 1970, and following its ruling overruling defendant's motion to dismiss, and being duly advised,

NOW FINDS THAT more than twenty-five (25) days have elapsed since the election involved in this proceeding; that proof of service of notice to the defendant, R. Vance Hartke, has been filed showing service on November 18, 1970; and further finds that no cross-petition or cross-petitions have been filed herein within the time specified by the Statute, and that such petition for the recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, should be granted, and that a recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, should be granted, and that a recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, should be ordered in this cause.

NOW, THEREFORE, IT IS HEREBY ORDERED that the petition for recount of the votes cast for the office of United States Senator in the General Election held November 3, 1970, by the petitioner Richard L. Roudebush against the defendant contestee, R. Vance Hartke, be and the same is hereby granted, and a recount be made of each and all the precincts in Marion County, Indiana, as prayed for in petitioner's petition herein, to-wit :

1st WARD, Precincts 5 and 6; 2nd WARD, Precinct 1; 3rd WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8 and 9; 4th WARD, Precincts 3, 7 and 8; 5th WARD, Precincts 1 through 8, all inclusive; 6th WARD, Precincts 1 through 9, all inclusive; 7th WARD, Precinct 2; 8th WARD, Precinct 5; 9th WARD, Precincts 2, 4, 6 and 7; 10th WARD, Precincts 1, 6, 10 and 11; 11th WARD, Precincts 1, 2, and 4; 12th WARD, Precincts 1, 6, 7 and 8; 13th WARD, Precincts 2, 3, 5, 6, 8 and 9; 14th WARD, Precinct 4; 15th WARD, Precincts 3 and 4; 16th WARD, Precincts 1, 2, 4, 6, 7, 9 and 10; 17th WARD, Precincts 2 and 3; 18th WARD, Precinct 15; 19th WARD, Precincts 5 and 12; 20th WARD, Precincts 1, 5, 10 and 11; 22nd WARD, Precincts 2, 4, 6, 10 and 14; 23rd WARD, Precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11 and 12; 24th WARD, Precincts 5, 6 and 7; 25th WARD, Precincts 2, 3 and 6; 26th WARD, Precinct 1; 27th WARD, Precincts 8, 16, 17 and 18; 28th WARD, Precincts 5, 10, 11, 17, 18 and 24; 29th WARD, Precinct 1; 30th WARD, Precincts 4, 5, 7 and 8; Center Township, Outside, Precinct 3, Decatur Township, Precincts 4, 9 and 12; Franklin Township, Precinct 3; Lawrence Township, Precincts 15, 17, 23 and 24; Perry Township, Precincts 3 and 27; Warren Township, Precincts 3 and 30; Washington Township, Precincts 12, 20, 22, 36 and 37; Wayne Township, Precincts 10, 14, 16, 24, 34 and 35.

AND IT IS FURTHER ORDERED that the following Recount Commission be and the same is hereby appointed

to conduct such recount of the votes cast for the office of United States Senator in the General Election held on November 3, 1970, under the jurisdiction and orders of this court:

Samuel J. Walker, a competent mechanic familiar with the voting machines; John R. Hammond, a member of the Republican Party, which cast the highest vote in this state for Secretary of State in the last preceding General Election; and Duge Butler, a member of the Democrat Party, which cast the next highest vote in this state for Secretary of State in the last preceding General Election.

AND IT IS FURTHER ORDERED that on the 8th day of December, 1970, at the hour of 9:00 A.M., the same being no sooner than five (5) days after the date of this order, said Commission so appointed herein shall convene and commence such recount of the votes cast for the office of United States Senator in the General Election held on November 3, 1970, and expeditiously complete the same. Said Commission is to convene and commence the recount at the storage place of said voting machines in Marion County, Indiana, at 2001 Northwestern Avenue, Indianapolis, Indiana, and for absent voters ballots, tally sheets, Canvassing Board returns, and any and all other paraphernalia attendant upon said election and the voting therein at their storage place or places in the City-County Building, Indianapolis, Marion County, Indiana.

/s/ GLEN W. FUNK

JUDGE, Superior Court of Marion County, Indiana, Room #3

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

VERIFIED APPLICATION FOR TEMPORARY RESTRAINING ORDER

David W. Mernitz, being duly sworn, states:

1. Plaintiff Vance Hartke has heretofore filed with the court his complaint for injunctive relief, seeking to restrain the operation and execution of state statutes under which the defendant Richard L. Roudebush has sought to secure a recount of the votes cast for the office of United States Senator at the general election of November 3, 1970, on the ground that such statutes are in conflict with Article I, Section 5, of the Constitution of the United States, which provides that "Each house shall be the judge of the elections, returns, and qualifications of its members . . ."

2. Plaintiff has sought to present this constitutional question to each court in which a recount petition has been filed by defendant Roudebush, by moving to dismiss said petition on the ground that the court lacks jurisdiction

of the subject matter of the action. Such recount petitions have been filed in eleven counties of the state.

3. On December 1, 1970, the judge of Superior Court No. 3 of Marion County overruled plaintiff's motion to dismiss, ordered a recount, appointed defendants Samuel J. Walker, John R. Hammond and Duge Butler as a recount commission, and directed said commission to convene on December 8, 1970 and commence a recount.

4. Under the provisions of Burns Ind. Stat. Ann. Section 29-5403, and under the present circumstances, ninety percent of the costs of a recount involving two or more counties in a state-wide elective office are required to be paid from the general fund of the state. If recount procedures are permitted to go forward in Marion County and elsewhere pending determination of this action, the public at large and the plaintiff will be required to bear expenses which may be totally unnecessary and which cannot be retrieved or recovered.

5. In his petition for recount filed in Marion County by defendant Roudebush, and in public statements by Roudebush and his aides following the election, allegations of fraud have been made in connection with said election. In the order directing a recount, the court has directed the recount commission to convene for said recount "at the storage place for voting machines . . . and [at the storage place] for absent voters ballots, tally sheets, Canvassing Board returns, and any and all other paraphernalia attendant upon said election and the voting therein . . .", notwithstanding the fact that Burns Ind. Stats. Ann. Section 29-5413 provide that the only materials required to be made available to the recount commission are "ballots and voting machines . . . together with all tally

sheets . . . and all lists of the names and addresses of all persons registered by the clerk as having voted" for the contested office. The only purpose served by making "all paraphernalia attendant upon said election and the voting thereon" available to the recount commission is to enable said commission to determine and resolve the aforesaid allegations of fraud. Such attempted determination and resolution of such allegations by the recount commission will usurp the constitutional function of the Senate to be "the judge of the elections, returns, and qualifications of its members" and will lead to violation of the integrity of the ballots, tally sheets, voting machines, Canvassing Board returns and other paraphernalia, the preservation of which is necessary to a proper determination by the Senate of any allegations of fraud which may be properly be presented to it.

6. The plaintiff and other members of the public will therefore be irreparably damaged if the defendants are not restrained pending a hearing.

WHEREFORE, affiant prays on behalf of plaintiff that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond and Duge Butler be temporarily restrained and enjoined from taking any action to effectuate any procedures leading to a recount pending on a hearing on plaintiff's application for an interlocutory injunction.

/s/ DAVID W. MERNITZ

David W. Meritz

STATE OF INDIANA)
) SS:
COUNTY OF MARION)

Personally appeared before me David W. Mernitz, who stated that the facts contained in the foregoing Verified Application for Temporary Restraining Order are true to the best of his knowledge, information and belief.

Dated this 3rd day of December, 1970.

/s/ MARILYN J. PARSONS
Notary Public

My Commission Expires:
March 30, 1973

MARILYN J. PARSONS

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

TEMPORARY RESTRAINING ORDER

The Court having considered the Complaint for Injunctive Relief filed by plaintiff herein, wherein he prays that a three judge district court be designated, and that such court determine and declare the laws of the State of Indiana to be unconstitutional insofar as they purport to provide the machinery and procedures by which a recount of votes in an election for the office of United States Senator shall be conducted, and having further considered the Verified Application for Temporary Restraining Order filed herein, wherein said plaintiff prays that the defendants be temporarily restrained from proceeding to recount the votes cast in, among other places, certain precincts in Marion County, Indiana, during the pendency of this action, now finds that the integrity of the ballots tally sheets, voting machines and other paraphernalia which may be the subject of examination, inspection and handling in connection with the operation of a recount commission, will be compromised, all to plaintiff's irrepa-

rable damage, if a temporary restraining order is not granted. Such finding is based upon the evidence submitted by the verification of David W. Mernitz affixed to the application for temporary restraining order.

IT IS THEREFORE ORDERED that the defendant Richard L. Roudebush, his attorneys, agents, and all persons acting in his behalf or in concert with him, directly or indirectly, and the defendants Samuel J. Walker, John R. Hammond and Duge Butler be, and they are each hereby restrained and enjoined from taking any action whatsoever to effectuate any of the procedures for conducting a recount for the office of United States Senator for the State of Indiana, in Marion County, Indiana, or elsewhere, pending a hearing on plaintiff's complaint.

IT IS FURTHER ORDERED that this order shall be and remain in force until hearing and determination by the full court of plaintiff's petition for an interlocutory injunction.

IT IS FURTHER ORDERED that the United States Marshal serve a copy of this order, and plaintiff's Complaint for Injunctive Relief upon each of said defendants and make his due return hereon.

Dated this 3rd day of December, 1970, at 6:15 o'clock P.M.

/s/ S. HUGH DILLIN

Judge, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

NOTICE OF HEARING

TO: Richard L. Roudebush
R.R. 3
Noblesville, Indiana 46060
and
Congressional Office Building
Washington, D. C.

John R. Hammond
431 East Hanna Avenue
Indianapolis, Indiana 46227

Samuel J. Walker
2214 North Kenwood Avenue
Indianapolis, Indiana 46208

Duge Butler
156 East Market Street, Room 400
Indianapolis, Indiana 46204

Honorable Edgar D. Whitcomb
Governor, State of Indiana
State House
Indianapolis, Indiana 46204

Honorable Theodore L. Sendak
Attorney General of Indiana
State Office Building
Indianapolis, Indiana 46204

The plaintiff having filed his complaint for injunctive relief and having applied for an interlocutory injunction, you are hereby notified that a hearing on plaintiff's request for an interlocutory injunction will be held at Room 203, United States Court House, Indianapolis, Indiana, on Thursday, December 17, 1970, at 10:00 A.M. before a three-judge district court.

The parties are directed to file with the Clerk on or before 12:00 noon on December 16, 1970, whatever briefs they may desire to file with regard to the application.

The Clerk is ordered to serve copies of this notice the defendants herein by registered mail, return receipt requested. The Clerk is further ordered to serve copies of this notice and the plaintiff's complaint herein upon and Governor and Attorney General of the State of Indiana, by registered mail, return receipt requested.

/s/ S. HUGH DILLIN

S. Hugh Dillin, Judge
United States District Court

Copies to:

John J. Dillon, Suite 711, 120 East Market Street, Indianapolis, Indiana, 46204

David W. Mernitz, 710 Guaranty Building, Indianapolis, Indiana, 46204

James L. Tuohy, 301 Circle Tower Building, Indianapolis, Indiana, 46204

Donald A. Schabel, Room 1120, 111 Monument Circle, Indianapolis, Indiana, 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

Plaintiff for cause of action alleges:

1. This action arises under the Constitution of the United States; the court has jurisdiction pursuant to Title 28, United States Code, Section 1343, subparagraph (3).

2. Plaintiff Vance Hartke was the Democratic candidate for reelection to the office of United States Senator from Indiana at the general election held November 3, 1970; defendant Richard L. Roudebush was the Republican candidate for election to said office at said general election.

3. On November 16, 1970, the Secretary of State of Indiana, pursuant to the provisions of Burns Ind. Stat. Ann. Section 29-5309, certified the returns of said election showing the plaintiff Hartke to have the highest number of votes for the office of United States Senator.

4. On December 3, 1970, the Governor of Indiana issued to plaintiff a certificate of election, pursuant to the provisions of Burns Ind. Stat. Ann. Section 29-5309. On December 4, 1970, the aforesaid certificate was delivered to the Clerk of the United States Senate.

5. On November 17, 1970, defendant Roudebush, purporting to act under and pursuant to the provisions of Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, filed a petition for recount of the votes cast in said general election for United States Senator in 137 precincts of Marion County, Indiana. Said petition for recount was filed in Superior Court No. 3 of Marion County, Indiana and docketed as Cause No. S 370-1177. A copy of said petition is attached hereto as Exhibit "A".

6. On November 19, 1970, plaintiff Hartke filed in said action a motion to dismiss on the ground that said court lacked jurisdiction over the subject matter of the action; a copy of said motion is attached hereto as Exhibit "B".

7. On December 1, 1970, the Superior Court of Marion County Room No. 3 entered an order overruling plaintiff's motion to dismiss. A copy of said opinion and order is attached hereto as Exhibit "C".

8. Thereafter, on December 1, 1970, said court entered an order for a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970, appointed defendants Samuel Walker, John R. Hammond and Duge Butler as a recount commission, and ordered said commission to convene and commence a recount on December 8, 1970. A copy of said order is attached hereto as Exhibit "D". Defendant Samuel Walker was incorrectly named in said order as Samuel J. Walker, whereas the true and correct name of the said

recount commissioner appointed by the court is Samuel C. Walker.

9. Those provisions of Indiana law contained in Burns Ind. Stat. Ann. Sections 29-5401 to 29-5417, insofar as they purport to authorize and establish a procedure for a recount of the votes for the office of United States Senator, conflict with the provisions of Article I, Section 5 of the Constitution of the United States, which provides that "Each house shall be the judge of the elections, returns, and qualifications of its members . . ."

10. If not restrained and enjoined, defendants Samuel Walker, John R. Hammond and Duge Butler, acting under color of state law, will convene and commence a recount of the votes cast for the office of United States Senator in the general election held November 3, 1970 in said precincts of Marion County, thereby depriving plaintiff of the rights, privileges and immunities secured to him by Article I, Section 5, of the Constitution of the United States. If not restrained and enjoined, defendant Roudebush, acting under color of state law as aforesaid, will seek to use and utilize the machinery and procedures provided in said statutes, in pursuing a recount in Marion County and elsewhere in the State of Indiana, and in challenging before the recount commission the determinations of precinct election boards heretofore made as to what ballots should be counted or not counted, as the case may be.

WHEREFORE, plaintiff prays:

1. That a three judge district court be designated, pursuant to the provisions of Title 28, United States Code, Section 2284, to hear and determine this action.

2. That an interlocutory injunction issue from and out of this court, restraining the defendants Samuel Walker, John R. Hammond and Duge Butler from convening and commencing a recount and restraining and enjoining Richard L. Roudebush from taking any actions to effect recount procedures under the aforesaid laws of the State of Indiana, pending final determination of this action.

3. That the court determine and declare said laws of the State of Indiana to be unconstitutional insofar as they purport to provide the machinery and procedures by which a recount of votes in an election for the office of United States Senator shall be conducted; and that the court permanently restrain and enjoin the defendants and restraining and enjoining the defendants Samuel Walker, John R. Hammond and Duge Butler from convening and commencing a recount, and the defendant Richard L. Roudebush and all persons acting in his behalf or in concert with him for taking any further action to use said machinery and procedures to carry forward a recount of the vote for the office of United States Senator in the general election of November 3, 1970.

4. Alternatively, that the court determine and declare that the State of Indiana has divested itself of whatever authority and jurisdiction it may have possessed with respect to the election of a United States Senator at the general election of November 3, 1970, by virtue of the certifications by the Governor and Secretary of State of Indiana that the plaintiff has been duly elected to that office.

5. Alternatively, that the court construe the provisions of Burns Ind. Stat. Ann., Sections 29-5401 through 29-5417, insofar as they purport to provide machinery and procedures for a recount of the votes for the office of

United States Senator, so as to limit said recount to a physical retabulation of the votes counted by the precinct election boards and recalculation of the totals thereof to correct arithmetical errors only, and to deny any authority to the recount commissioners or the court which appointed them, or any other person, excepting only the United States Senate, to make any further determination whatsoever as to which ballots should be counted, or not counted, as the case may be.

6. For such other and further relief as may be proper.

/s/ JOHN J. DILLON

John J. Dillon
120 East Market Street, Suite 711
Indianapolis, Indiana 46204

/s/ DAVID W. MERNITZ

David W. Mernitz
719 Guaranty Building
Indianapolis, Indiana 46204

James L. Tuohy
301 Circle Tower Building
Indianapolis, Indiana 46204

Attorneys for Plaintiff

NOTE:

For Exhibits A, B, C, D of Amended Complaint, see identical Exhibits A, B, C, and D of first Complaint for Injunctive Relief, included in this Appendix, *supra.*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP-70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION TO INTERVENE

Comes now THEODORE L. SENDAK, Attorney General of the State of Indiana, and moves the Court to intervene as a party defendant, pursuant to T. R. #24 of the Federal Rules of Civil Procedure, and tells the Court:

1. That he is the duly elected Attorney General of the State of Indiana; and,

2. That the Attorney General is given the sole authority under Indiana law to appear and defend the constitutionality of Indiana Statutes, Acts of 1889, Ch. 71, § 4; Acts of 1921, Ch. 85, § 2, the same being Burns' Indiana Statutes 49-1902, and Acts of 1927, Ch. 81, § 11, the same being Burns' 3-1111, and,

3. The above-captioned cause of action has been filed in this Court, seeking an injunction on the basis that the Indiana Re-Count Statute, Acts of 1945, Ch. 208,

§§, 324-330, the same being Burns' Indiana Statute 29-5401, *et seq.*, is unconstitutional in part; and,

4. Federal law recognizes that the State Attorney General is the proper party to appear and defend the constitutionality of state statutes when challenged, in that 28 U.S.C. 2284 (2) requires that "if the action involves the enforcement, operation or execution of state statutes . . ., at least five days notice of the hearing shall be given to the . . . Attorney General of the State."

WHEREFORE, Theodore L. Sendak, as Attorney General of Indiana, prays this Court to make him a party defendant in this action.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

Wendell C. Hamacher
Deputy Attorney General

By: PATRICIA J. GIFFORD

Patricia J. Gifford
Deputy Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION TO DISMISS

Theodore L. Sendak, as Attorney General of the State of Indiana, pursuant to Rule 12(B) F.R. Civ. P., moves the Court to dismiss the plaintiff's complaint, upon the following grounds, as such grounds appear in the allegations of the complaint.

I. The Court lacks jurisdiction of the subject matter in that:

1. A federal court is prohibited by statute from interference in a state court action. 28 U.S.C.A. 2283.

2. State courts have exclusive jurisdiction in a recount suit unless provisions of the statute offend the federal constitution.

II. The complaint fails to state a claim against defendants upon which relief can be granted, in that:

1. The plaintiff has an adequate remedy of law;

2. There is no such danger or irreparable danger clear and imminent, great and immediate, as would warrant a Court of Equity in enjoining enforcement of a state statute.

3. The plaintiff has failed to allege irreparable harm to the parties.

WHEREFORE, Theodore L. Sendak, Attorney General of the State of Indiana, prays the Court to dismiss the complaint on the basis of the facts alleged on the face of the complaint, pursuant to Rule 12(B) F.R. Civ. P.

Respectfully submitted,

THEODORE L. SENDAK
Attorney General of Indiana

Wendell C. Hamacher
Deputy Attorney General

By: PATRICIA J. GIFFORD

Patricia L. Gifford
Deputy Attorney General

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. Vance Hartke	)	
	)	
vs.	)	No. IP 70-C-694
	)	
Richard L. Roudebush, et al	)	

Entry for December 15, 1970

Honorable S. Hugh Dillin, Judge

This cause comes before the Court upon the motion of Theodore L. Sendak, Attorney General of the State of Indiana, for leave to intervene as a party defendant herein.

The Court having read and considered said motion and being fully advised, now Grants said motion.

Comes now said intervening defendant and files his motion to dismiss this cause of action.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION TO VACATE TEMPORARY RESTRAINING ORDER.

Defendant Richard L. Roudebush moves the court to vacate the temporary restraining order entered herein without notice to defendant on December 3, 1970, on the ground that it was issued in violation of 28 U.S.C. § 2283.

/s/ JOHN G. TINDER

John G. Tinder
620 Union Federal Building
Indianapolis, Indiana 46204

/s/ DONALD A. SCHABEL

Donald A. Schabel
111 Monument Circle
Indianapolis, Indiana 46204

Attorneys for defendant
Richard L. Roudebush

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO.
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

MOTION OF DEFENDANT RICHARD L. ROUDEBUSH TO DISMISS.

Defendant Richard L. Roudebush moves the court as follows:

1. To dismiss the action on the ground that the court lacks jurisdiction over the subject matter for the following reasons:

(a) A court of the United States is expressly prohibited by 28 U.S.C. § 2283 from granting an injunction to stay proceedings in a state court, and this action does not fall within any of the exceptions stated in said § 2283.

(b) Exclusive jurisdiction to determine the effect of the certificate of election issued to plaintiff Hartke and of the recount proceedings commenced by defendant Roudebush under the Indiana Election Code is

vested in the United States Senate by virtue of Article 1, § 5, of the Constitution of the United States.

2. To dismiss the action because the complaint fails to state a claim against defendant upon which relief can be granted.

/s/ JOHN G. TINDER

John G. Tinder
620 Union Federal Building
Indianapolis, Indiana 46204

/s/ DONALD A. SCHABEL

Donald A. Schabel
111 Monument Circle
Indianapolis, Indiana 46204

Attorneys for defendant
Richard L. Roudebush

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE, Plaintiff,	)	
v.	)	CAUSE NO. IP 70-C-694
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants.	)	
THEODORE SENDAK, ATTORNEY GENERAL OF INDIANA, Intervening Defendant.	)	

PRELIMINARY INJUNCTION

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. § 2284; on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through § 29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

The Court having heard the evidence, and having considered the briefs and oral arguments of counsel, and it appearing to a majority of the Court after due deliberation that the defendant Richard L. Roudebush has sought

and will continue to seek a recount of the votes cast in certain counties of the State of Indiana in the general election of November 3, 1970, for the office of United States Senator for the State of Indiana, if not enjoined from so doing, and it further appearing that the defendants, Samuel J. Walker, John R. Hammond, and Duge Butler will proceed to recount the votes cast for said office at said election in certain precincts of Marion County, Indiana, if not so enjoined; and a majority of the Court having made and filed its written opinion holding said statute to be unconstitutional with respect to such office, and finding that for said defendants to proceed with a purported recount in Marion County, Indiana, or elsewhere, would work irreparable injury to the plaintiff in that such action would compromise the integrity of the ballots, tally sheets, voting machines, and other paraphernalia of the election upon which plaintiff must rely to justify his certification of election to such office, in the event the defendant Richard L. Roudebush contests the same before the United States Senate, as he threatens to do, it is therefore

ORDERED, that the defendants Richard L. Roudebush, Samuel J. Walker, John R. Hammond, Duge Butler and their officers, agents, servants, employees and attorneys and all those in active concert or participation with them, be and they are each hereby restrained and enjoined from taking any action whatsoever under and pursuant to the provisions of Burns Ind. Stat. Ann. § 29-5401 through § 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of this action; provided, that plaintiff first give security in the sum of $5,000.00 for the payment of such costs and

damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined, such bond to be approved by the court or by the Clerk of the court;

IT IS FURTHER ORDERED, that the United States Marshal serve a copy of this preliminary injunction upon each of said defendants and make his due return hereon.

Dated this 19th day of December, 1970, but effective as of December 17, 1970, at 5:45 P.M., pursuant to the oral announcement of the court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER
William E. Steckler

/s/ S. HUGH DILLIN
S. Hugh Dillin
Judges, United States District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO:
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	
	)	
THEODORE SENDAK, ATTORNEY GENERAL OF INDIANA,	)	
	)	
Intervening Defendant.	)	

OPINION

This cause was heard before a three-judge District Court convened pursuant to 28 U.S.C. §2284, on plaintiff's application for a preliminary injunction to enjoin the operation and enforcement of Chapter 54 of Title 29 of the Indiana Election Code, Burns Ind. Stat. Ann. § 29-5401 through §29-5417, upon the ground that the application and operation of such statutes in respect to an election for the office of United States Senator is unconstitutional.

At the general election of November 3, 1970, the plaintiff, Vance Hartke, an incumbent United States Senator for Indiana, and the defendant Richard L. Roudebush were opposing candidates for Hartke's office. The canvass reflected that Hartke received the highest number of votes

cast for such office, and on November 16, 1970, the Secretary of State certified him to the Governor of Indiana as duly elected and the Governor, on December 3, 1970, gave to said candidate a certificate of his election, in the form required by Burns Ind. Stat. Ann. § 29-5309.[1] The certificate has been filed with the Secretary of the United States Senate.

On November 17, 1970, defendant Roudebush filed in the Superior Court of Marion County, Indiana, a petition for a recount of the votes cast in selected precincts of Marion County, stating in said petition his desire to contest said election. This court knows judicially that similar petitions were filed by him in ten other counties of the State of Indiana. The Superior Court of Marion County overruled a motion to dismiss the petition, and proceeded to appoint the defendants Samuel J. Walker, John R. Hammond and Duge Butler as a recount commission to recount the votes cast for the office of United States Senator in such selected precinct of Marion County, relying upon the Indiana recount statute, Burns Ind. Stat.

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1 Section 29-5309. "The secretary of state as soon as he shall receive such certified statements, shall compare and estimate the votes given for United States senator and for representative in congress, and certify to the governor the persons having the highest number of votes as duly elected; and the governor shall give to each of the persons returned to him as aforesaid a certificate of his election, sealed with the seal, and attested by the secretary of state: Provided, That no return of any county which has come into its hands, and which has been duly authenticated by the clerk of the circuit court thereof, under seal, as hereinbefore provided shall be rejected by said secretary of state, but he shall estimate, aggregate and tabulate, and report to the governor the total number of votes cast in each county for each candidate for state office, supreme judge or other officer to be elected by all the voters of the state, and members of congress as evidenced by the face of such returns so certified to him."

Ann. §§ 29-5401—29-5417, the pertinent parts which are set out below.[2] Said recount was ordered to be commenced on December 8, 1970.

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2 Section 29-5401. "Any candidate for any public office voted upon at any election held within the state of Indiana shall have the right to have the votes cast for the office for which he was a candidate recounted in any voting precinct or precincts in any county or counties, as the case may be, under the conditions and in the manner and with the effect as in this article [§§ 29-5401-29-5417] provided."
Section 29-5402. "The right of recount provided in this article [§§ 29-5401—29-5417] shall be available to any candidate for any public office without exception and including specifically, but without limiting the generality of the foregoing, all candidates for any township, town, city, municipal, county, district, judicial, legislative, and state elective office and candidates for membership in the house of representatives and in the senate of the United States; and such right of recount may by any candidate be exercised with respect to one [1] or several or all of the voting precincts in which votes were cast for the office for which he was a candidate."
Section 29-5405. "Each such petition shall state the office and the precinct or precincts within the county in respect of which the petitioner desires a recount; . . . that the petitioner in good faith believes that either through mistake or fraud the votes cast for such office at such election in such precinct or precincts were not correctly counted and returned; that the petitioner desires to contest said election in respect of said office, . . . and that he desires a recount of all of the votes cast for such office in such precinct or precincts. The term 'contest' as used in this section shall include all forms of contest herein or hereafter recognized as appropriate means for contesting title to a public office. . . ."
Section 29-5409. "Upon the filing of such petition and undertaking, the court or the judge thereof in vacation shall, upon the expiration of twenty-five [25] days after such election and upon proof of service of said notice or notices, grant such petition and cross-petition or cross-petitions as may have been filed and order the recount of such votes in such precinct or precincts . . . ."
Section 29-5414. "When such recount is completed by the commission it shall make and sign its certificate showing the total number of votes received in such precinct or precincts by each candidate for such office or offices and state

On December 3, 1970, plaintiff Hartke brought this action to enjoin the defendant recount commission from proceeding with the recount in Marion County, and to enjoin the defendant Rondebush generally from taking further action to obtain a recount in the other counties in which his recount petitions were filed. Jurisdiction was predicated on 28 U.S.C. § 1343(3), with request that a three-judge district court be convened to hear the case, pursuant to 28 U.S.C. §2284. The jurisdiction of a three-

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therein who received the highest number of votes in such precinct or precincts for such office or offices and by what plurality, and shall file the same with the clerk of the circuit court. The clerk shall enter such certificate in the order book of such court.

"(Except for the offices of governor, lieutenant-governor, and members of the general assembly,) such recount certificates shall supersede for all purposes all previous returns made in any form of the votes thus recounted; . . ."

Section 29-5415. "If a recount is had in respect to an office for which votes were cast in all voting precincts of the state, (except governor and lieutenant-governor,) or in more than one [1] county, (except members of the general assembly,) the clerk of the circuit court where such recount was had shall determine whether the votes cast as shown by such recount certificates differ from the votes in such precinct or precincts as the same had been returned to, and tabulated by the county canvassing board, and if he finds there is such difference he shall make his certificate showing the total vote in such county for such office for each candidate as corrected in accordance with the votes shown by such recount certificate and shall forthwith transmit the same to the secretary of state . . . and if the secretary of state shall previously have included in his tabulations votes cast for such office as returned by such county canvassing board he shall correct such tabulation, . . . and the candidate shown by such corrected tabultion to have received the highest number of votes for such office shall be entitled to a certificate of election or commission for such office notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office."

Note: Portions in ( ) added by 1961 Amendment, as discussed *infra*.

judge court over an action in which a candidate for the Congress of the United States alleges the deprivation of a right under color of a state election law, and the unconstitutionality of such law in the light of the Constitution of the United States has been recognized. Voltaggio v. Caputo, D. N.J., 1963, 210 F.Supp. 337, app. dis., 371 U.S. 232, 83 S.Ct. 325, 9 L.Ed.2d 494. See also Socialist Labor Party v. Rhodes, S.D. Ohio, 1968, 290 F.Supp. 983, aff'd as modified, *sub nom.* Williams v. Rhodes, 393 U.S. 23, 89 S.Ct. 5, 21 L.Ed.2d 24. This court was properly convened, and has jurisdiction in the premises.

The attorney General of Indiana has been permitted to intervene, pursuant to 28 U.S.C. § 2284(2), and has filed a motion to dismiss the action. The defendant Roudebush has likewise moved to dismiss. An argument common to both motions is that this court lacks jurisdiction to grant injunctive relief, as prayed for, because prohibited by 28 U.S.C. §2283.[3]

The statute referred to has been characterized as ambiguous, by the Supreme Court of the United States, speaking without dissent. Leiter Minerals, Inc. v. United States, 352 U.S. 220, 77 S.Ct. 287, 1 L.Ed.2d 267. It is therefore not surprising that various, and to some extent contradictory, interpretations of it have been made. One view, which we find persuasive, is that Section 2283 is not a jurisdictional statute, but is rather, in essence, a statutory adoption of the doctrine of comity and hence discretionary in its application. In spite of its absolute language, it does not prevent a federal court from enjoining state court proceedings where special circumstances

3 "A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

justify such relief. Baines v. City of Danville, 4 Cir., 1964, 337 F.2d 579, 593. This appears to be particularly true with respect to cases arising pursuant to 42 U.S.C. §1983, as to which 28 U.S.C. § 1343, under which this suit is brought, is the jurisdictional analogue. Machesky v. Bizzell, 5 Cir., 1969, 414 F.2d 283; Carmichael v. Allen, N.D. Ga., 1967, 267 F.Supp. 985 (three-judge court); Landry v. Daley, N.D. Ill., 1968, 288 F.Supp. 194, 233. See Dombrowski v. Pfister, 380 U.S. 479, 85 S.Ct. 1116, 14 L.Ed.2d 22.

Another ground for dismissal urged by the defendant Roudebush is that this court lacks jurisdiction because exclusive jurisdiction to determine the effect of the recount proceedings commenced by him is in the United States Senate by virtue of Article 1, Section 5 of the Constitution of the United States, which provides "Each House shall be the Judge of the Elections, Returns and Qualifications of its own Members . . ." But a right claimed under the same Constitutional provision—the right to have the returns of the November 3 election judged by the Senate and not piecemeal by various commissions appointed by various state courts—is the very right which plaintiff asserts is being violated by the defendant Roudebush's state court actions. Regardless of the position taken, all parties agree as to the supremacy of the Senate itself to make the final determination as to the winner of the recent election Reed v. County Commissioners, 277 U.S. 376, 48 S.Ct. 531, 72 L.Ed. 924; Barry v. U. S. ex rel Cunningham, 279 U.S. 597, 49 S.Ct. 452, 73 L.Ed. 867.

The great weight of authority supports plaintiff's position that court proceedings for *recount or contest* with regard to an election for representative in the national House of Representatives or for United States Senator are unconstitutional, as in conflict with Article 1, Section

5, whether brought in state or federal court. State ex rel Fleming v. Craford, 1891, 28 Fla. 441, 10 So. 118; Burchell v. State Board of Election Commissioners, 1934, 252 Ky. 823, 68 S.W.2d 427; Opinion of the Justices, 1956, 152 Me. 212, 142 A.2d 532; Belknap v. Board of Canvassers, 1893, 94 Mich. 516, 54 N.W. 376; McLeod v. Kelly, 1942, 304 Mich. 120, 7 N.W.2d 240; State ex rel 25 Voters v. Selvig, 1927, 170 Minn. 406, 212 N.W. 604, Odegard v. Olson, 1963, 264 Minn. 439, 119 N.W.2d 717; State ex rel McCue v. Blaisdell, 1908, 18 N.D. 55, 118 N.W. 141; Laxalt v. Cannon, 1964, 80 Nev. 588, 397 P.2d 466; Opinion of Justices, 1921, 80 N.H. 595, 113 A. 293; Smith v. Polk, 1939, 135 Ohio St. 70, 19 N.E.2d 281; Sutherland v. Miller, 1917, 79 W.Va. 796, 91 S.E. 993; State ex rel Wettengel v. Zimmerman, 1946, 249 Wis. 237, 24 N.W.2d 504; Koegh v. Horner, 1934, S.D. Ill., 8 F.Supp. 933; Peterson v. Sears, et al, 1964, N.D. Iowa, 238 F.Supp. 12.

An equally strong body of authority supports the same rule with regard to the lack of jurisdiction in the courts to countenance suits for *recount or contest* with regard to elections of members of the State legislatures. The reasoning is identical and is predicated on provisions of the various state constitutions which copy Article 1, Section 5 of the Constitution of the United States either verbatim or in substance. We deem it unnecessary to burden this opinion with a collection of these many cases, inasmuch as the Supreme Court of Indiana has had occasion to speak three times in the past twenty years on the subject of legislative recounts, attempted under the statute here involved, Burns Ind. Stat. Ann. §§ 29-5401—29-5417, inclusive.

This trilogy consists of the cases of State ex rel. Acker, et al v. Reeves, 1951, 229 Ind. 126, 95 N.E.2d 838, State ex rel Beaman v. Circuit Court of Pike County, et al, 1951,

229 ind. 190, 96 N.E.2d 671, and State ex rel Batchelet v. Dekalb Circuit Court, et al, 1967, 248 Ind. 481, 229 N.E. 2d 798. The provision of the Constitution of Indiana which controlled the cases is Article 4, Section 10, which is virtually identical to Article 1, Section 5 of the Constitution of the United States.[4] In each case, a defeated candidate for the General Assembly of Indiana filed a petition for a recount pursuant to Burns Ind. Stat. Ann. §§29-5401—29-5417, in each case the trial court appointed a recount commission, and in each case the Supreme Court of Indiana issued a writ of prohibition restraining the court from proceeding with the recount on the ground that it was constitutionally impermissible in the light of Article 4, Section 10.

In order to understand *Acker, Beaman,* and *Batchelet,* and, for that matter, our own decision, it is necessary to make plain that the unadorned word "recount" has been taken to mean in Indiana. It will be noted immediately that the statute (Footnote 2) does not specify in what manner the recount shall be conducted; however, we find from the undisputed evidence in the case before us, and in addition know judicially, that by custom, usage and practice recounts in Indiana have been conducted under the statute as follows: (1) with regard to votes registered on voting machines, the machines are inspected by the commission, and the totals checked against the tally sheets and certificates of memoranda as to total votes cast for each office; this operation is purely mechanical and/or mathematical and creates no problems; (2) with regard to votes cast by paper ballot, which includes all of the votes cast in some of the counties of the State of Indiana and

---

4 Article 4, Section 10: "Each House, when assembled, shall . . . judge the elections, qualifications and returns of its own members."

a part of the votes cast in all counties of the State, the commission exercises its own judgment, sometimes supplemented by instructions from the court which appoints it, as to which ballots are to be counted and which not counted, and thereby, for all purposes, nullifies and supersedes the judgment of the duly constituted election boards in this regard.

Further, the election laws provide that after tallying the vote, each local election board must place in separate envelopes, clearly marked, all of the ballots which it counted, and all of the ballots which it did not count. Such envelopes are then sealed with wax, to preserve their integrity. The commission necessarily breaks the seals and removes the ballots for the purpose of its recount—or rejudging, as would appear to be more accurate—and reassembles them according to its own determinations, which may well be by 2-1 vote in many instances.

There is no way in which the commission may make a simple mathematical verification of the vote. As illustrative of the problems encountered, a ballot may, under certain circumstances, be valid and countable for one office, but not for another. If counted for any office it is placed in the "counted" envelope; but the commission has no way of knowing how the election board counted it—whether for all offices, or only for some. The main problems, of course, arise with respect to the counting of ballots not absolutely perfect on their face. What is a distinguishing mark. What is the intent of the voter? As the record in the many permissible recount cases, too numerous to cite, all reflect, judgments must constantly be made in determining which ballots to count and which not to count when "recounts" are made under the Indiana recount law.

It was in this context, then, that the Supreme Court of Indiana first confronted the constitutional question as to the jurisdiction of the Indiana courts to appoint recount commissions with respect to an election for a seat in the Indiana House of Representatives. The Court quoted Article 4, Section 10 Indiana Constitution and pointed out its similarity to Article 1, Section 5 United States Constitution. It then quoted with approval from Lucas v. McAfee, 1940, 217 Ind. 534, 29 N.E.2d 403, 29 N.E.2d 588, as follows:

> " 'The right of legislative bodies to judge the elections, qualifications, and returns of their own members is of ancient origin. The history of the doctrine reveals that it was established in the constitutional law of England in the year of 1586, during the reign of Queen Elizabeth . . .
>
> 'Provisions guaranteeing this right are to be found in the federal Constitution and in the organic law of every state in the Union, in language substantially if not identically like that employed in ours. . . . That right is deemed essential to the enactment of legislation without interruption and confusion and to maintain a proper balance of authority where the functions of government are divided between coordinate branches. it is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread. Dinan v. Swig, 1916, 223 Mass. 516, 112 N.E. 91.' "

The Court then went on to hold the statute unconstitutional and void to the extent that it purported to apply to members of the General Assembly, and entered its writ of prohibition accordingly.

Beaman, like *Acker*, arose out of the general election of 1950, and was considered at about the same time by the

same court. Here original suits were brought in two counties to obtain a recount for the office of Joint State Senator and recount commissions were appointed in each county. The judges of the two courts were again prohibited from proceeding with the recounts. On behalf of respondents, as in the case before us, the argument was made that in carrying out the provisions of the recount statute the courts and their commissions were acting simply in a ministerial capacity. The Court pointed out its recent decision in *Acker*, and held that since the recount statute was unconstitutional as applied to recounts for the legislature, it was, to such extent, void ab initio and inoperative from the time of its passage. Therefore, it reasoned, it could not conver any jurisdiction upon any court either for the performance of judicial or ministerial acts, and hence the appointment of recount commissioners was beyond the lawful jurisdiction of the courts involved.

Also, as here, respondents argued that a recount of votes is not an adjudication of the election or rights to an office but is only a proceeding in discovery. The Supreme Court rejected this theory also, pointing out the provisions of Section 29-5414, "*Such recount certificates shall supersede for all purposes all previous returns . . .*" (Supreme Court's emphasis) and of Section 29-5415, ". . . the candidate shown by such corrected tabulation to have received the highest number of votes for such office shall be entitled to a certificate of election . . . notwithstanding one may have been issued upon a previous tabulation of the total votes cast for such office." The Court concluded from such provisions that if the effect of the statute was not an adjudication of the election and returns of members of the legislature it approached so nearly thereto "that it may interfere with the constitutional right of each house

of the Legislature to judge the elections and returns of its members . . . its effect is more than a mere procedure for the discovery of evidence." Unconstitutionality was reaffirmed.

These decisions put the matter at rest for the next several years. However, in 1961 the General Assembly attempted to bring the law into conformity with the Indiana Constitution with respect to the members of the general assembly and certain other state officers. It did so by inserting the language "Except for the offices of governor, lieutenant-governor, and members of the general assembly" where the same presently appear in Section 29-5414 and 29-5415 (set out in ( ), Footnote 2), and by adding certain paragraphs to Section 29-5414 to provide that with respect to the general assembly, the results of the recount would be forwarded to the appropriate presiding officer for information only. It will be noted that all of the language found in *Beaman* to constitute a recount "more than a mere procedure for the discovery of evidence." remained untouched as to recounts for the office of United States Senator.

However, the effort to legitimize recounts for the General Assembly failed. In *Batchelet* a recount for State Senator was attempted in the DeKalb Circuit Court under the amended statute, and the Court appointed a recount commission. The recount was immediately halted by a temporary writ of prohibition issued by the Supreme Court of Indiana. The Senate itself then resolved the dispute, as provided by Article 4, Section 10. In thereafter making the temporary writ permanent, in stead of simply dismissing the proceeding as moot in light of the seating of Senator Batchelet, the Supreme Court again quoted from *Acker:* "(The) right of legislative bodies to judge the election, qualifications, and returns of their own

members is of ancient origin. It is no more subject to judicial interference or control than the judicial functions of this court are subject to the dictates of the legislative or executive departments. The Constitution has defined a domain upon which courts may not tread." The lower court was held to have no jurisdiction.

If, as cannot possibly be denied, it is unconstitutional under Indiana law for an Indiana Circuit or Superior Court to conduct a recount for the office of member of the General Assembly, even after the passage of the abortive 1961 amendments, *a fortiori* it is manifestly repugnant to the Constitution of the United States for such a court to attempt to conduct a recount for the office of United States Senator, as to which office such amendments were not even sought to be applied.

We now return to further discussion of the effect, or lack of effect, of 28 U.S.C. § 2283. At the outset, it will be noted that the section contains three specific exceptions which remove the statutory inhibition in certain circumstances (Footnote 3). Obviously, if the suit at hand falls within one of the exceptions, no further discussion is required. It has been urged in recent cases arising under 42 U.S.C. § 1983[5] and brought pursuant to 28 U.S.C. § 1343 that Section 1983 itself furnishes a specific exception applicable to Section 2283, in that it specifically authorizes relief by ". . . suit in equity, or other proper proceeding for redress." Indeed, it has been so held.

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5 Section 1983. "Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Cooper v. Hutchinson, 3 Cir., 1950, 184 F.2d 119. In *Dombrowski, supra,* the Supreme Court found decision of thi question unnecessary to its disposition of the case, and therefore declined to resolve it. It likewise specifically declined to resolve the question in Cameron v. Johnson, 390 U.S. 611, 88 S.Ct. 1335, 20 L.Ed.2d 182. The proposition therefore remains quite viable.

However, it is true that whether one takes the view of the Third Circuit as expressed in *Cooper* that Section 1983 constitutes a specific exception to section 2283, or whether one takes the view we have adopted that notwithstanding Section 2283 a state court proceeding may be enjoined where special circumstances justify such relief, it does not follow that equitable relief will automatically be granted. Indeed, in some of the cases relied upon in support of each of the rules as above stated, refining the scope of Section 2283, injunctive relief was ultimately denied by reason of the application of principles of comity and the abstention doctrine. E.g., Baines v. City of Danville, *supra;* Cooper v. Hutchinson, *supra.*

The question involved here is one of federal constitutional law, and the state statute involved is not of an uncertain nature. Neither is the state statute susceptible of a limiting construction, because it has already been construed three times by the Supreme Court of Indiana and thrice held unconstitutional. In such circumstances the abstention doctrine does not apply. Harman v. Forsenius, 380 U.S. 528, 85 S.Ct. 1177, 14 L.Ed.2d 50; Baggett v. Bullitt, 377 U.S. 360, 84 S.Ct. 1316, 12 L.Ed.2d 377; England v. Louisiana State Board of Medical Examiners, 375 U.S. 411, 84 S.Ct. 461, 11 L.Ed.2d 440; McNeese v. Board of Education, 373 U.S. 668, 83 S.Ct. 1433, 10 L.Ed.2d 622; City of Chicago v. Atchison, T. & S.F. R. Co., 357 U.S. 77,

78 S.Ct. 1063, 2 L.Ed.2d 1174; Spector Motor Service, Inc. v. McLaughlin, 323 U.S. 101, 65 S.Ct. 152, 89 L.Ed. 101.

Just as the defunct legal posture of the Indiana recount statute makes clear that abstention is not appropriate, the special circumstances disclosed by the facts impel the conclusion that the active interposition of this Court is required. What defendants are threatening to do, and will do if not enjoined, constitutes an interference with the orderly processes of the recent election, and with the Constitutional prerogatives of the United States Senate. The plaintiff, as a candidate for re-election to that body, has a constitutional right to have the *election contest*, if there is to be one, held before the sole tribunal having jurisdiction in the premises, the Senate itself. It is essential to plaintiff's right that the integrity of the ballots cast at such election be preserved, i.e., that they be held in their original envelopes, with the seals intact, and that the integrity of the tally sheets, voting machines, and other paraphernalia of the election likewise be preserved until such time as they may be called for by the Senate, so that no question may arise as to the character of the evidence which the Senate will be called upon to judge. Plaintiff's rights will be irreparably harmed if such evidence is compromised, for which there can be no adequate remedy at law. The harm to be avoided will take place immediately, if not enjoined. Like Humpty Dumpty, the seals on the ballots cannot be put back together again, if once destroyed, hence the frequent reason given for abstention —that all can be made right through state appellate procedures—does not apply.

We surmise that the defendant's argument here would be less heated if, for example, we had before us, instead of a purported recount commission appointed by the Superior Court of Marion County, a purported recount

commission appointed by a Justice of the Peace of Beanblossom Township, Brown County, Indiana, directed by the Justice to open, inspect, and judge anew all of the ballots cast in the whole State for the office of United States Senator. But what would be the difference?

As was said by the Supreme Court of Indiana in *Beaman*, the statute involved was void *ab initio* and conferred no power upon any court to perform either a ministerial or a judicial act thereunder, as to "recounts" for legislative office. Consistently, therefore, there could be no difference at all between the legal standing of the defendant commissioners in this action, and the hypothetical Brown County commissioners. Thus considered, what we are here enjoining is not in any true sense a "proceeding" in a State court, but, more appropriately, a threatened invasion of the sanctity of the ballots by persons acting wholly without legal authority.

The respective motions to dismiss the action are therefore each denied, and a preliminary injunction will issue forthwith, as prayed for by the plaintiff, upon his giving bond as provided in Rule 65(c), F.R.C.P., in the penal sum of $5,000.00.

Dated this 19th day of December, 1970, as of December 17, 1970, at 5:45 P.M., pursuant to the oral announcement of the Court's decision and order at the conclusion of the hearing on the prayer for a preliminary injunction.

/s/ WILLIAM E. STECKLER

William E. Steckler

/s/ S. HUGH DILLIN

S. Hugh Dillin
Judges of the United States
District Court

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
v.	)	CAUSE NO:
	)	IP 70-C-694
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants.	)	

Stevens, Circuit Judge, dissenting.

Regardless of whether or not we agree with the Indiana trial court's construction of Indiana law (and we should not substitute our interpretation of state law for his), we still must decide whether a federal court should enjoin a recount of votes cast for office of United States Senator pursuant to state election laws. No federal court has ever done so before.

In my opinion the temporary restraining order was improvidently entered on December 3, 1970, and should be vacated. At that time the recount was not scheduled to commence until December 8, 1970. No explanation has been advanced for the failure to seek review in the Indiana Supreme Court, including a stay of the recount if needed to give that Court adequate time to consider all issues, both state and federal, subject to further review, if necessary, by the United States Supreme Court. See *United States ex rel Lawrence v. Woods*, No. 18169, 7th Cir., October 19, 1970 (slip opinion, pp. 4-6). Nor has there been

any suggestion that the Indiana judiciary is not perfectly capable of handling Indiana litigation without assistance or interference from a federal district court. I think this court is prohibited from enjoining the recount by the plain language of 28 U.S.C. Section 2283, and Supreme Court opinions articulating the policy underlying that statute.[1] *Atlantic C.L.R. Co. v. Brotherhood of Locomotive Engineers*, 398 U.S. 281; *Amalgamated Clothing Workers v. Richmond Bros. Co.*, 348 U.S. 511.

Plaintiff asserts that an injunction should be granted to protect him from a deprivation of his constitutional right ot have the United States Senate act as the sole judge of the Indiana election returns, U.S. Const., Art. I, Section 5. But the proof which he offered does not establish any threatened deprivation of that right. In my opinion the exercise of "judgment" by state election officials at various states of the counting and recounting of ballots does not invade the Senate's power to make the final judgment on the outcome. The evidence establishes without contradiction that the Indiana recount procedures have integrity, that the original ballots and other records are carefully preserved for future study, that an adequate record of what transpires during a recount is maintained, and that any judgment as to whether or not certain categories of ballots (or even individual ballots) should be counted, may be reviewed subsequently by the body having the power finally to resolve an election contest.

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1 I also think it was improper to enter the temporary restraining order without notice five days before the recount was scheduled to commence. In my opinion notice to the opposite party should always be required absent a compelling showing of need and a convincing explanation for the failure to give notice.

Plaintiff has failed to prove that he would suffer irreparable harm if the recount were permitted to proceed. Indeed, it is entirely possible that the recount would show that a Senate contest would be futile, and thereby avoid a protracted controversy which may now be required. Moreover, as a practical matter, I would assume that the work of the Senate would be facilitated, rather than impaired, by the availability of a fairly conducted recount, in addition to the original count, before undertaking its work.[2]

I would vacate the temporary restraining order and dismiss the complaint.

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2 We have not been advised about the Senate procedures for resolving election contests. It is of some interest that the House of Representatives "generally follows State law and the rulings of State courts in resolving election contests, . . ." See H.R. Rep. No. 513, 87th Cong., 1st Sess. 42 (1961). It would seem likely that the Senate would also rely on state practice. Indeed, I would expect the recount procedure, in contrast to making the final judgment in a contest, to be treated as part of the "Manner of holding Elections" covered by Section 4 of Article I. See U.S. Const., Art. I, Sec. 4.

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

E. ROBERT SEAVER
Clerk of the Court

December 23, 1970

The Honorable Theodore L. Sendak
Attorney General of Indiana

RE: SENDAK v. HARTKE
October Term, 1970

Dear Sir:

Your application for a stay of preliminary injunction heretofore denied by Mr. Justice Marshall was presented to the Chief Justice, as requested in your telegram of December 22, and it was also denied by him with the following endorsement thereon:

"Denied, 12/23/70

/S/ W.E.B.
Chief Justice"

Very truly yours,

E. ROBERT SEAVER, Clerk

By MICHAEL RODAK, JR.
Michael Rodak, Jr.
Deputy Clerk

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

E. ROBERT SEAVER
Clerk of the Court

March 22, 1971

William F. Thompson, Esq.
Assistant Attorney General
of Indiana
219 State House
Indianapolis, Indiana 46204

RE: ROUDEBUSH v. HARTKE, No. 1232
SENDAK v. HARTKE, No. 1236, O.T. 1970

Dear Sir:

The Court today took the following action in the above cases:

> "Further consideration of the question of jurisdiction in these cases is postponed to the hearing of the cases on the merits. The cases are consolidated and a total of one hour is allowed for oral argument."

I enclose a memorandum describing the time requirements and procedures under the Rules.

The additional docketing fee of $50, Rule 52(a) is due and payable.

Very truly yours,

E. ROBERT SEAVER, Clerk
By HELEN K. LOUGHRAN
(Mrs.) Helen K. Loughran
Assistant Clerk

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

R. VANCE HARTKE,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. IP 70-C-694
	)	
RICHARD L. ROUDEBUSH,	)	
SAMUEL J. WALKER,	)	
JOHN R. HAMMOND,	)	
DUGE BUTLER,	)	
	)	
Defendants,	)	
	)	
THEODORE L. SENDAK, Attorney General of the State of Indiana,	)	
	)	
Intervening Defendant.	)	

Before the
HONORABLE JOHN P. STEVENS
HONORABLE WILLIAM E. STECKLER
HONORABLE S. HUGH DILLIN

OFFICIAL TRANSCRIPT OF THE PROCEEDINGS

DECEMBER 17, 1970

United States Courthouse
Indianapolis, Indiana

Mary A. Whyte
Official Court Reporter

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No. 2	—Certification of the Secretary of the Senate of the United States, 12/11/70, as to attached certificate of election, signed by the Governor of Indiana and the Secretary of State of Indiana on 12/3/70	6	8
No. 3	—Petition for Recount of Votes and for Contest of Election with Recount of Votes, filed by Richard L. Roudebush against R. Vance Hartke in the Superior Court of Marion County on 11/17/70, Cause No. S370 1177, certified by the Clerk of Marion County 12/1/70 (Exhibit A to Complaint)	6	8
No. 4	—Motion to Dismiss filed by Defendant R. Vance Hartke in Cause No. S370-1177 on 11/19/70, certified by the Clerk of Marion County 12/1/70 (Exhibit B to Complaint)	7	8
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		Identified	*Admitted*
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

VANCE HARTKE, Plaintiff,	)	
v.	)	CAUSE NO. IP 70-C-694
RICHARD L. ROUDEBUSH, SAMUEL J. WALKER, JOHN R. HAMMOND, DUGE BUTLER, Defendants.	)	
THEODORE SENDAK, ATTORNEY GENERAL OF INDIANA, Intervening Defendant.	)	

APPEARANCES:

For Plaintiff:

Mr. John J. Dillon
Indianapolis, Indiana

Mr. James L. Tuohy
Indianapolis, Indiana

Mr. David W. Mernitz
Indianapolis, Indiana

Mr. Thomas Downs, of Counsel
Lansing, Michigan

For Defendants: Mr. Donald A. Schabel
Indianapolis, Indiana

Mr. John G. Tinder
Indianapolis, Indiana

For Intervening Defendant: Mr. Wendell Hamacher

Ms. Patricia Gifford
Office of the Attorney General
Indianapolis, Indiana

(Tr. P. 3]

BE IT REMEMBER That on the 17th day of December, 1970, at 10:20 a.m., E.S.T., proceedings were held in the above-entitled cause in the United States District Court for the Southern District of Indiana, Indianapolis Division, at the United States Courthouse, in the City of Indianapolis, Indiana, before the Honorable John P. Stevens, Judge of the United States Court of Appeals for the Seventh Circuit, the Honorable William E. Steckler, Judge of the United States District Court for the Southern District of Indiana, and the Honorable S. Hugh Dillin, Judge of the United States District Court for the Southern District of Indiana, as members of a Three-Judge District Court; that such proceedings were in the words and figures following, to wit:

JUDGE STEVENS: Will you call the case, please.

MR. JAMES TYRE, DEPUTY CLERK: Yes, Your Honor.

Indianapolis 70 Civil 694, R. Vance Hartke, plaintiff, versus Richard L. Roudebush, Samuel J. Walker, John

R. Hammond, and Duge Butler, defendants, and Theodore L. Sendak, Attorney General of the State of Indiana, intervening defendant.

JUDGE STEVENS: Gentlemen, we have before us motion to dismiss the complaint, the motion to vacate the

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temporary restraining order, the motion of the Attorney General to intervene, which I believe has already been allowed, and the application of the plaintiff—although it is not a paper specifically named this way, in substance is asking, as I understand it, to turn the temporary restraining order into a preliminary injunction.

We discussed briefly the questions of procedure, and the plaintiff has represented to us that the legal argument on the motion to dismiss and the jurisdictional issue might well be affected by the evidence that is proposed to be offered. And, therefore, without indicating any opinion whatsoever on the jurisdictional issue—which, of course, is a threshold question—we have decided, in view of the representation that the testimony would take only about an hour in any event, that we will receive the evidence, including both the exhibits and the oral testimony, without taking the time to have opening statements made ahead of time, but we will just make the record first. After the record is made, we will then hear argument. And we thought that, again as the plaintiff has the burden, we will hear from the plaintiff first on the argument after the evidence is in.

So if counsel for the plaintiff will proceed—and I will appreciate it if when you come up—because I am not as

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familiar with you gentlemen as Judge Steckler and Judge Dillin are—would you give me your names each time?

MR. DILLON: Yes, sir. I am John Dillon, and I will represent the plaintiff in presenting the exhibits and the testimony. Mr. Mernitz will make the arguments.

The first seven exhibits, Your Honor, are all various and sundry court records which I will offer, and all are under seal of various and sundry persons authorized to certificate documents under either Federal law or the State law and, therefore, admissible on that basis. I would just like to offer these and hand them to the defendant for his examination, if I might, on that basis.

JUDGE STEVENS: Whichever way will expedite it.

MR. DILLON: First I want to offer the certification of the election returns by the Secretary of State of Indiana to the Governor of Indiana, on which is affixed the Seal of the State of Indiana, the Secretary of State's Office.

JUDGE STEVENS: Would you give me the date of the documents each time?

MR. DILLON: Date of the documents?

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JUDGE STEVENS: Yes, sir.

MR. DILLON: The date of this document is 23 November 1970.

JUDGE STEVENS: Thank you.

MR. DILLON: Plaintiff's Exhibit for identification "Number 2" is the certification of the Secretary of the

Senate of the United States of the certificate of election signed by the Governor of Indiana and certified by the Secretary of State of Indiana and forwarded to the Senate as prescribed in the Constitution of the United States.

JUDGE STEVENS: The date?

MR. DILLON: The date of the document is 3 December 1970. The date of the certification is the 11th day of December 1970.

JUDGE STEVENS: The later certification—is that the Secretary of the Senate?

MR. DILLON: Yes, sir, it is—Secretary of the Senate of the United States.

The next document is the "Petition for Recount of Votes and for Contest of Election with Recount of Votes" filed by plaintiff Richard L. Roudebush against defendant R. Vance Hartke in the Superior Court of Marion County, Cause No. S370 1177, certified by the Clerk of Marion County and dated November 17th of 1970.

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JUDGE STEVENS: Is that the same as Exhibit A of the complaint?

MR. DILLON: It is, Your Honor.

Exhibit No. 4 for identification is the "Motion to Dismiss" in the same cause, filed by defendant R. Vance Hartke.

JUDGE STEVENS: That is Exhibit B, I take it?

MR. DILLON: It is, yes, sir. Dated November 19, 1970, and certified by the Clerk of Marion County.

Marion County, Your Honor, is the county seat of Indianapolis, Indiana, and the place wherein the Superior Court sits.

Plaintiff's Exhibit 5 for identification is the Opinion and Order of the Court in the same cause, dated December 1, 1970, and certified by the Clerk of the County.

JUDGE STEVENS: And that is Exhibit C.

I sometimes find it helpful to have the cross-references right in the transcript.

MR. DILLON: Yes.

Plaintiff's Exhibit 6 for identification is the Order of the Court ordering the recount, in the same cause, dated December 1, 1970, and certified by the Clerk of Marion County.

Plaintiff's Exhibit No. 7 for identification is a certifi-

[Tr. P. 8]

cation by the Marion County election officials filed with the Secretary of State within the time provided by statute and certified by the Secretary of State of Indiana.

JUDGE STEVENS: Do you have the date there?

MR. DILLON: Yes—I am sorry. November 16, 1970.

JUDGE STEVENS: Thank you.

JUDGE DILLON: I am sorry. I didn't understand what that exhibit is.

MR. DILLON: That is a certification from the Marion County election officials, on provision of the statute, to correct errors in tabulation, which was made in Marion County, and after the official returns were in, certified

to the Secretary of State. He then, in turn, recertified the numbers to the Governor.

JUDGE DILLIN: All right.

MR. DILLON: Plaintiff now offers into evidence plaintiff's exhibits for identification 1 through 7 and offers them as Plaintiff's Exhibits 1 through 7.

JUDGE STEVENS: Is there any objection?

MR. SCHABEL: No objection, Your Hopor.

JUDGE STEVENS: Exhibits 1 through 7 will be received in evidence.

(Plaintiff's Exhibits Nos. 1 to 7, inclusive, were

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admitted in evidence, which exhibits are as follows:)

(HERE INSERT)

MR. DILLON: Now, Your Honor, we have one witness we would like to call—Mr. James Kelley.

JAMES F. KELLEY, a witness on behalf of the plaintiff, having been first duly sworn, testified as follows:

DIRECT EXAMINATION,
QUESTIONS BY MR. DILLON:

1 Q Please state your name to the Court.

A James F. Kelley.

2 Q What is your business or occupation, Mr. Kelley?

A I am an attorney here in the City of Indianapolis.

3 Q Are you a member of this Bar?

A I am, and the Bar of the State of Indiana.

4 Q Where did you receive your training?

A Indiana University, Indianapolis; undergraduate, Indiana University, Bloomington.

5 Q Do you have any connection in an official capacity with the management or the operation of elections in Marion County, Indiana?

A I do.

6 Q What is that position?

[Tr. P. 10]

A I am Vice President of the Marion County Election Board and Vice President of the Canvassing Board for the 1970 General Election.

8 Q Would you just briefly describe your duties to the Court in that capacity.

A The Marion County Election Board is charged, of course, with the responsibilities of conducting the election, all the elections to be held in Marion County, either city or general, and we do so.

There are three members of the Election Board: The County Clerk and one member appointed by each county chairman of the two major political parties.

9 Q And you are appointed by what party chairman, Mr. Kelley?

A The Democrat Party.

10 Q In other words, this is a bipartisan board consisting of one Republican, one Democrat, and the clerk of the county?

A That is correct.

11 Q Now, how long have you been Election Commissioner, Mr. Kelley?

A Since prior to the general—I believe it was prior to the primary election of 1967.

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12 Q Then how many elections have you actually served as Election Commissioner in?

A Well, let's see. We had two in '67, two in '68, we had a skip-year in '69, and two in '70; so that would be six—counting primary and general, that would be six elections.

13 Q Prior to that did you have any experience with the election process in this county?

A I did. I have served as a precinct election official, as a judge, and precinct board, election board. I have served as a sheriff on precinct election board, as a watcher, as a ward chairman.

14 Q And for how long have you so served?—without specifying each general classification or category. Just give the Court an idea.

A Well, since I came to Indianapolis to go to law school in 1957, I have been actively participating in politics here on the precinct and county level since then.

15 Q Have you been concerned in all of the elections in Marion County in some capacity with reference to the process of election since 1957?

A I don't believe I have missed one. I believe I have been, in some capacity or another, connected with the election procedure.

[Tr. P. 12].

16 Q Now, have you ever been involved in a petition for a recount and contest in an election?

A I have.

17 Q What was that case, if you remember?

A Yes. That was a Patricia A. Montgomery vs. Dwight L. Cottingham. It was a recount for Marion County councilman from the Third Councilmanic district. That was arising out of the general election of 1966.

18 Q What was your position in that?

A I was appointed by the Superior Court Room 6 of Marion County as a Recount Commissioner.

19 Q And did you so act and serve?

A I did.

20 Q Now, calling your attention to the election of 1970, the fall election of 1970, will you generally describe the paraphernalia and materials and the actual voting, modus operandi, on election day in the fall of 1970.

MR. TINDER: If it please the Court, we object to this question because the issues formulated here by the pleadings do not embrace a contest in that sense of an election. The issues here go to whether or not the election-day machinery if extended before the election is complete, by

the election statutes, would give a recount of the

[Tr. P. 13]

tabulation of the vote. This is by no means a contest in the sense that the evidence of any irregularities would be admissible here. And, since that is not within the issues, a generalized question of that kind, which wants him to describe generally actions taking place in the election machinery on the last election day, would be irrelevelant and incompetent and would lead these issues into a Pandora's box far, far astray from their present formulation.

JUDGE STEVENS: Counsel, I think we have a limit of about an hour to this Pandora's box, and I think it might be relevant to paragraph 4.

MR. DILLON: It is, Your Honor.

JUDGE STEVENS: If any colleagues disagree, I will—

(The members of the Court indicated assent.)

WITNESS KELLEY: If I may proceed?

JUDGE STEVENS: Yes, sir.

A In Marion County we vote primarily by voting machine, but we have, of course, an absentee ballot statute, and, therefore, absentee ballots are cast on paper ballots; so that in each precinct

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we must make provision for not only recording and counting the machine vote which is recorded

on the voting machine but also make provision for the counting and the casting of absentee ballots and the preservation thereof and the delivery back to the Canvassing Board at the close of election day.

In each precinct—there is delivered to each precinct in the morning—or, actually, the inspector picks it up the day before or possibly even as much as the Sunday before—certain supplies which are designed to provide that precinct with the necessary paraphernalia for preserving these ballots and returning them. The machines themselves are delivered some time ahead to the voting place. Of course, the seals are broken—At the close of the voting, the machine is sealed after the tabulation is taken off it. If I might—

21 Q Just go right ahead.

A All right. Well, if I might have that box lying there, I can, I think more easily—

JUDGE STEVENS: If we are going to use something like that, we ought to mark it.

MR. DILLON: It is marked, Your Honor.

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I have to suffer with a lawyer for a witness, for which I apologize—getting out of my orderly presentation.

22 Q (By Mr. Dillon) I hand you what has been marked for purposes of identification as "Plaintiff's Exhibit 8" and ask you to tell the Court what that is, if you know.

A Yes. This is the box of supplies which is given to each inspector in each precinct on election day.

The election board in each precinct in the State of Indiana is made up of three people: two judges, one of each political faith, and the inspector, who is of the political faith of that party which received the most ballots for the office of Secretary of State in that county in the last general election. So—

23 Q Now, directing your attention to Plaintiff's Exhibit 8 for identification, is that the same type of box of equipment that was sent to each precinct election board on election day in the November 1970 election in Marion County?

A Yes, it is.

24 Q All right. Now, generally describe to the Court what is in that box.

[Tr. P. 16]

A This box—May I open it?

25 Q Yes, go ahead.

JUDGE STEVENS: The contents are in evidence as well as the box. They have been marked?

WITNESS KELLEY: They are all marked.

JUDGE STEVENS: I see.

A This box contains the tally sheets upon which the precinct election board and the clerks— with the assistance of the clerks are to record the tally of the votes as they are counted in the precinct.

It might be helpful if I could describe the handling of the absentee ballots and the handling of the machines separately.

26 Q All right. Let's follow the exhibit. First I call your attention to Exhibit 8-A. Or do you want to start with 8-C?

A I would prefer to.

27 Q All right. I call your attention to Exhibit 8-C, and tell the Court what that is, if you know.

A This is the tally sheet which is used by the precinct election board and the clerks to tally the votes.

Of course, the machines are opened at six o'clock in the morning, and people proceed and

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come in and they are checked for their registration; they sign the voters' poll list; they go into the machine; they vote, and they leave the precinct polling place.

Sometime during the day the Marion County Election Board delivers into each precinct the absentee ballots, which are indicated that they have been voted and the voters live in that precinct. During the day those ballots are to be opened by the precinct inspector. They come in an envelope with an affidavit on the outside signed by the voter. First he calls the name. If there is a challenge, then a challenge may be made by one of the challengers or one of the other election board members at that time. If there is no challenge, then the clerks record upon the voters'

poll list the name of the individual voting by absentee ballot and mark their initials by that name's signature in the voters' poll list. They also record on the registration records that that voter has voted. At that point the envelope is opened—If there has been no challenge, at that point the envelope is opened and the absentee ballots are removed, but without unfolding them. They should have the seal of the Clerk of the Cir-

[Tr. P. 18]

cuit Court of Marion County on the outside corner of each ballot. At which point both of the clerks on the precinct election board should initial, alongside the seal, each ballot—now, without unfolding the ballots, to preserve the secrecy of an individual's vote. Those ballots should be then placed in a ballot box and kept until the time when all of the paper ballots are counted, so that all of the paper ballots are commingled and it is not easily discernible—unless there has only been one person who voted by paper ballot—how any individual may have voted. At the end of the day or whatever other time they choose—and this is often done at the end of the day—the ballot box is opened. The paper ballots are then counted.

After the closing of the polls, the machine back is opened. This is when the supplies in this box come primarily into use. At this time the tally sheets are removed and the clerks are assigned the task—and the judges and the inspector—of tallying the vote.

Now, you will notice that on Exhibit 8-C, which is the tally sheet, this provides for a place for the recording of the tally for three different machines in each precinct. Each machine is to be

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recorded—

MR. TUOHY: Excuse me.

(Mr. Tuohy got out extra copies of the instruments.)

WITNESS KELLEY: There is more than one copy of this in each box, and if the Court—

MR. TUOHY: Perhaps at this time it would be in order to introduce exhibit—

JUDGE DILLIN: I think you better make your offer before you go into the contents there in too much detail.

JUDGE STEVENS: Do you wish to offer these in evidence?

MR. DILLON: No, I am not ready to offer them yet, Your Honor.

JUDGE STEVENS: I don't think he should be testifying as to them before they are in evidence. I don't know whether they are going to be part of the record or not.

MR. DILLON: I agree.

28 Q (By Mr. Dillon) Would you call to your attention Mr. Kelley, what's been marked as "Exhibit 8-A".

A I was speaking and identifying the tally sheet which is marked "Exhibit 8-C".

29 Q I understand that. Would you identify Exhibit 8-A.

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A Exhibit 8-A is a paper bag which is titled "Bag No. 7", which is to contain—at the closing of the polls, all voted absentee ballots are to be placed in this bag, sealed, and returned to the Canvassing Board of Marion County by the inspector or one of the judges.

30 Q Now, I call your attention to what's been marked for identification as "Exhibit 8-B".

A 8-B is another paper bag, which is titled "Bag No. 5". This bag is to contain all the defective absentee ballots, sealed by sealing wax, and returned to the Canvassing Board of Marion County at the close of the polls, by the inspector or a judge or both judges.

31 Q Now, will you call your attention to Exhibit 8-D for identification.

A 8-D is the "Certificate of Memoranda of the Total Votes Cast for All Offices and for or against Constitutional Amendments".

32 Q Now, Mr. Kelley, Exhibit 8 and sub-exhibits 8-A, B, C, and D that you have identified were the actual materials or copies? Are those actual materials used?

A They are the same printing, yes.

33 Q Those are blanks of the same thing that was sent

[Tr. P. 21]

out on election day in the election of 1970 in the fall; is that correct?

A Yes, sir.

MR. DILLON: Now, the plaintiff offers Exhibits 8, A, B, C, and D into evidence.

JUDGE STEVENS: Do you have any voir dire?

MR. SCHABEL: We have no objection.

JUDGE STEVENS: They may be received in evidence.

(Plaintiff's Exhibits Nos. 8 and 8-A, 8-B, 8-C, and 8-D were admitted into evidence, which exhibits are as follows:)

(HERE INSERT)

34 Q Now, Mr. Kelley, we can talk about the exhibits. Let's now move to when this paraphernalia gets to the courthouse from the election board in the precincts. Just briefly tell the Court what the physical processes are when this arrives at the courthouse at the end of the day, of the election in 1970.

JUDGE STEVENS: Could you clarify for me: When you use the term "paraphernalia", are you talking about the counterparts of the Exhibits 8-A to D?

MR. DILLON: Yes, sir. I am trying to elimi-

[Tr. P. 22]

nate all the rest of the stuff in there, which I don't think is material.

JUDGE STEVENS: All right. I just want to be sure I am following you.

A After the tally is completed in each precinct by machine and paper ballot and the Certificates of Memoranda are made out and the paper ballots—

35 Q Who makes out the Certificate of Memoranda?

A The election board. The Certificate of Memoranda is made out and is signed by the inspector and the two judges and attested to by the clerks. The Tally Sheet is attested to by the two clerks.

36 Q Then what happens to it?

A One each of the Tally Sheet and the Certificate of Memoranda are sealed in an envelope. There are many copies of the Certificate of Memoranda and there are many copies of the Tally Sheet. These are all made out, but only one of each is sealed in an envelope. These are the official of the two.

Then all of the paper ballots that are used in that precinct—those that are voted are placed in Bag No. 7, which is Exhibit 8-A, and those which are not voted or found to be defective are placed

[Tr. P. 23]

in Bag No. 5, which is Exhibit 8-B; sealed with sealing wax and returned to the County Board, which is waiting in the City-County Building for these supplies to be returned to them.

37 Q Now, tell the Court what the Canvassing Board is.

A The Canvassing Board is made up of three parties: again, the County Clerk, one Democratic member, one Republican member. The practice for as long as I have been able to find out has always been that the Election Board serves as the Canvassing Board.

And in Marion County we carry on two separate canvasses. We carry on an official canvass and an unofficial canvass. We hire a completely bipartisan crew, of half Democrats and half Republicans, who tally from the official Certificates of Memoranda. Then we hire a group of accountants who tally from the Tally Sheets. Then the two are brought down and laid out on separate sheets and then balanced to be sure there have been no mistakes in addition or any numerical errors of that kind. And then these two sheets are brought into balance, and finally, then, the official is certified to the Secretary of State.

38 Q Now, does the Canvassing Board count those ballots that were in the paper bags you have

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testified to?

A Absolutely not.

39 Q Where do those paper bags repose?

A Those paper bags, after the Canvassing Board has completed its duties, are turned over to the Clerk of the Circuit Court for safekeeping.

40 Q Where do the voting machines repose?

A The voting machines are picked up by the employees of the Clerk's office. When the voting machines are locked and sealed at the close of election day, the keys are delivered to the Auditor of the County for safekeeping. The machines are sealed, cranked back down, and are picked up by the trucking firm and taken back to the Marion County voting warehouse.

JUDGE DILLIN: What does "cranked down" mean?

WITNESS KELLEY: The machines are devised so they will be at eye level. They have a crank on the side of them, Your Honor, and by turning that crank, it jacks the machine up. When it is cranked down, it lowers the base. It does not affect the vote in any way. In fact, once the voting machine is locked and the seal placed in place, to change the totals on the machine—

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other than getting into the back and having the mechanic do it—you would have to break the seal on the front of the machine before the totals on the machine could be changed.

41 Q All right. Now, with reference to the absentee ballots which are in the bags that you have testified to, and the exhibits, what reflects the count that the Canvassing Board takes on those ballots? How is that reflected?

A The official Canvassing Board takes that from the Certificate of Memoranda of the Total Votes

Cast, which is a total figure for each precinct. In other words, it states right on Exhibit 8-D, "Copy only, final total from Machine Tally Sheet". In other words, all absentee ballots—all machines would be added into one figure and recorded there. The Tally Sheet—

42 Q Are those figures separated on the Tally Sheet?

A They are, sir.

43 Q How do those figures relate to the bags?

A On the face of the bag there is a statement, Exhibit 8-A or Bag 7, that—blank space—"All voted absent voters' ballots". The number of ballots is marked there on that bag and they are placed therein. On the "defective" bag it says:

[Tr. P. 26]

"This bag contains"—blank—"defective absent voters' ballots".

JUDGE STEVENS: Excuse me. On 7-A, do they just put the number of ballots, or do they show how many voted each way?

WITNESS KELLEY: Your Honor, on the bag it is merely the statement of the number contained in that bag.

44 Q (By Mr. Dillon) In other words, the thrust of the judge's question, that number is in gross—right?

A That number is in gross. And—

45 Q Now, I think we can expedite this if we just answer the questions.

A I am sorry.

46 Q Now, you have stated that in the other bag—you have categorized that as the "defective ballots". What do you mean by "defective"?

A Well, the bag itself provides for four reasons for its rejection, on the face of it.

47 Q What are those reasons?

A I don't believe it is limited to just that, but I will read those four, if I may:

"rejected for some reason or reasons as defined in the Election Law."

[Tr. P. 27]

(2) "were cancelled, because the voter or voters returned his ballot or their ballots to the Inspector of this precinct and did not avail himself or themselves of the privileges of an absent voter." In other words, he thought he was going to be out of town; he went down and voted absentee, and then he showed up at the polls and voted that day—which he may do—so the ballot would be returned as a spoiled vote.

(3) "were unopened, because the voter or voters appeared and voted in person." That sounds a great deal like 2.

(4) "were classed as defective, because it was made to appear by due proof to this Election Board that such elector or electors who had marked and forwarded such ballot or ballots had died."

48 Q Now, Mr. Kelley, referring back to the Cottingham case when you were a commissioner and there was a petition for recount, would you describe to the Court exactly how you proceeded to count the ballots in the bags to reconcile those or to count them with reference to offical tally in that election?

MR. TINDER: We object to the question for

[Tr. p. 28]

the reason it is irrelevant and immaterial what happened in the 1966 case involving a recount of the votes for a county councilman candidate and would be too remote and, secondly, it would be completely unrelated to the issues here, in a request for recount of the United States Senator, what this witness's experience in another case, non-related case would be.

MR. DILLON: The evidence is offered as a predicate for an expert opinion from a man whom I believe we have qualified as an expert in elections. He has superior knowledge to that of a layman.

JUDGE STEVENS: Is he an expert in recounts?

MR. DILLON: Well, I think he is an expert in the running of elections, and I think he has sufficient background and sufficient superior knowledge of how these things are done to reflect to the Court how it would be done. The same type of equipment is down there now. I think he can relate how it has been done and he can render

an opinion, based upon his experience, how it must be done to get back to the same count any time, if the paraphernalia is the same.

[Tr. P. 29]

JUDGE STEVENS: Well, here the evidence is subject to the objection. I am not sure he is qualified as an expert on the basis of one recount, but we will hear the evidence.

JUDGE DILLIN: If it can be shown, or not, that the witness, by virtue of the experience he has related, has knowledge generally as to how recounts have been conducted in this county, I think it would be more apropos.

MR. DILLON: Yes. I thought I had so qualified it, Your Honor. I will.

JUDGE DILLIN: Yes, but you asked about what he did in one specific case.

MR. DILLON: I am offering that only to demonstrate the physical properties. I will later tie up the expertise on it.

JUDGE STEVENS: Why don't you—perhaps it would be helpful to us—ask him what other experience he's had in recounts or familiarity with recounts?

MR. DILLON: All right. Yes, sir.

JUDGE STEVENS: How often do these things happen and so forth.

49 Q Mr. Kelley, in your position as Vice President of the Election Board, what other recounts have

[Tr. P. 30]

you had any connection with? And I don't mean as commissioner, but just generally in your time.

A Mr. Dillon, as far as I know, there has never been another recount filed since I have been in Marion County, for Marion County. There are many cases which I have examined, in being involved in these, all describing the procedure that has been used in various recounts. I am familiar with those. I am very familiar with what is necessary to tally votes and what would be necessary to retally votes. Would not be materially—

50 Q Is that based upon your some 13 years; experience working around the polls and working in the courthouse?

A It is.

JUDGE STEVENS: We will hear the evidence without passing on its weight at this time.

MR. DILLON: All right.

51 Q Now; was the paraphernalia that we have talked about here in Exhibits 8 and 8-A through D the same type of paraphernalia that you were faced with in the Cottingham case?

A Exactly.

52 Q All right. How did you proceed to count the

[Tr. P. 31]

absentee ballots in the bags that you have described?—those that were counted and those that

were rejected. Just tell the Court how you did it—not what you did, but procedure.

A To determine the paper—

MR. TINDER: Excuse me. I'd like to record an objection, please, because there has been no proof it was done correctly in the particular case he is now reciting. There has been no basis laid to show this is done correctly or incorrectly in that particular case, as it might affect its particular use in this case; so we object to it as irrelevant, incompetent and immaterial.

JUDGE STEVENS: May I inquire if that was done according to a court order in that prior proceeding?

WITNESS KELLEY: It was, Your Honor.

MR. DILLON: You were under a court order brought under the same statute and the same provisions as the case in question here today; is that not true?

WITNESS KELLEY: It was, yes.

MR. DILLON: I want you to tell the Court how you got to counting the ballots in those bags.

[Tr. P. 32]

Physically, how did you do it?

WITNESS KELLEY: Yes, I understand that.

JUDGE STEVENS: May I be sure? You occupied that position in that recount that one

or more of the defendants would occupy in this case if the recount were to go ahead?

WITNESS KELLY: Yes.

A We opened each of the two bags I have described as "8-A" and "8-B", either containing the defective absent ballots or the voted absent ballots. We looked at each ballot in each bag. Some ballots which had been counted by the precinct election board, we rejected. Some that had been rejected by the precinct election board, we decided were valid ballots and counted them. Then, on that analysis, we made a report to the Court.

53 Q You counted the ballots in the bags that had been rejected as well as the ballots in the bags that had been accepted?

A Yes. There were ballots in the rejected bags from each precinct which we decided had been improperly rejected and we counted them. And there were ballots in the bags that had been reported as counted that we decided were improperly counted, and we refused to count.

[Tr. P. 33]

54 Q What did you do with the count?

A We reported the result of this recount to the Court which had appointed us and which had asked us to do this in these certain precincts.

55 Q In that case, what did the Court do with reference to your figures?

A Then the case was removed to the General Term and the Court—finally ended in Circuit Court,

and the Court looked at all the ballots again; accepted some that we had accepted; rejected some that we had rejected. Completely redid everything we did and completely redecided what ballots should be accepted, what ballots shouldn't be accepted, and again substituted their judgment for that of the precinct election boards.

JUDGE STEVENS: May I interrupt?

MR. DILLON: Yes, sir.

JUDGE STEVENS: Was there a record kept of exactly what you did before you transmitted the results of your work to the Court? In other words, could the Court tell which ballots you had counted that had not been previously counted, and vice versa?

[Tr. P. 34]

WITNESS KELLEY: Yes, sir.

JUDGE STEVENS: The Court could tell what categories of changes you made, and then it could agree or disagree with what you did?

WITNESS KELLEY: Yes, sir. And, in fact, it did disagree.

JUDGE STEVENS: When you got through counting, what envelopes did you restore the ballots to? Did you put them back in the envelopes in which they came?

WITNESS KELLEY: I believe we resorted them into different envelopes.

JUDGE STEVENS: But the Court was able to tell what resorting had been done?

WITNESS KELLEY: Yes, sir. We kept a precinct-by-precinct record of that.

56 Q Directing your attention to the bag which contained the votes which the precinct election board had tallied and counted: Why could you not just take those ballots and make a numerical count as the precinct election board had done?

A Because no matter how much instruction you give the precinct election people, they don't always follow their directions. They're asked to tally the

[Tr. P. 35]

absentee ballots on the Tally Sheet and then record them and then add them in. It is not at all uncommon for them to totally fail to do that. They have two or three absentee ballots, or five, and they have one machine. They just add the two together, write it down. They are eager to go home. They have been there since six o'clock in the morning, and they want to go home and they hurry up and write the total figure down and send it in along with the bag saying they have five absentee ballots. You look on the tally sheet and there is nothing to show how many absentee ballots.

So if you merely go through the Tally Sheets and try to retally, they won't jibe with the number on the bag, you see, and there is no way the public counter—On the Tally Sheet you record the number of votes cast on the machine, but that doesn't even jibe because the machine can break down. The mechanic goes out; has to run a couple of votes on the machine—a voter goes in and fails

to operate the machine properly. And the numbers just do not jibe down the line.

Did I go over that too rapidly?

57 Q No. I want to stick to the paper ballots. Why, then, can't you just take the paper ballots out of the bag, that were counted by the precinct

[Tr. P. 36]

election board, and mathematically or numerically retally those just as the precinct board did?

A That is not always possible, either. If I may give an example: A man votes straight Republican up in the circle on the absentee ballot, paper ballot; but then he decides, down below, to vote for one or two Democrats—decides to vote for Vance Hartke, but yet he's got an X up there. And the precinct election board has decided, by putting it in the valid bag, that it is a valid ballot. There is no way on earth to tell how they recorded that. So unless the Recount Commission makes another judgment as to the validity or non-validity of that ballot, there is not possible way to make a recount without making those judgments.

58 Q Let's just assume that in this particular election that you were a recount commissioner and you opened and you found exactly that situation. Could you not reconcile that with the precinct election board's count?

A No, sir, not if there were a number of people. The main problem you have is that not every voter votes for every office, you see. So, therefore you are assuming that if you knew the total number

[Tr. P. 37]

of people who voted by absentee, then you could figure out how the result was counted by the board in the precinct. That is not true, because you are not sure that every voter who voted—it was properly recorded. There is no way, believe me. I have gone through this and sweated over these things, and it is absolutely impossible to determine, just by looking at the ballots, who counts what.

JUDGE STECKLER: I'd like to ask a question, Mr. Kelley. Did you encounter disagreement among the members of the Recount Commission?

WITNESS KELLEY: Yes, sir. In fact, one of the members refused to sign the determination to the Court.

JUDGE STECKLER: Who would make the determination?

WITNESS KELLEY: A majority vote.

JUDGE STECKLER: You had three members?

WITNESS KELLY: Yes, sir.

JUDGE STECKLER: This was according to party affiliation?

WITNESS KELLEY: I believe that is correct, Your Honor.

JUDGE STECKLER: What is the composition of the Recount Board?

[Tr. P. 38]

WITNESS KELLEY: There is a machine mechanic and a Democrat and a Republican.

59 Q (By Mr. Dillon) Mr. Kelley, let's stay with the paper ballot which you described as being marked in the circle with a straight party vote and then had other markings, individually X'ed for individual votes. Going back to your experience in the precinct, and if you are on the precinct board, as you have been, what is your view of what you would have been required to do at the precinct level with that ballot?

A I believe that the ballot is an invalid ballot, at least as to the Senatorial—I am assuming that is the race—at least as to the Senatorial race. My experience has been that the precinct election boards try very hard to vote as many votes as they can; that they don't want to disqualify anybody's vote, but—

60 Q All right. Let's say you disqualified that ballot in the precinct. What would you do with it?

A The problem being—

61 Q No, no—physically. You disqualified—

A You might disqualify part of it and not all of it.

[Tr. P. 39]

If you disqualify part of it and not all of it, I suppose I would put it in the counted bag. But if I disqualified all of it, I would put it in the disqualified bag.

62 Q And if you counted it in any way, you would put it in the qualified bag?

A That is the judgment I would make, yes.

63 Q All right. And that bag would then go downtown as you stated?

A Yes, sir.

64 Q Now, based upon your experience, when the recount commissioners get to that bag and open it, is there any way, if such ballot was voted, that they could reconcile numerically the numbers between the official Tally Sheet and the absentee ballots in that bag?

A Not if they had a number of absentee ballots. If they only had one absentee ballot—or maybe even two or three, I suppose that would be. But if you had more than that, it would be absolutely impossible.

65 Q Based upon your experience in the precincts that are in contest in Marion County today, is it your opinion that such ballots will exist?

A Yes. And, in fact, I know they have, because I have looked at the vast majority of these bags,

[Tr. P. 40]

the number recorded of votes cast, and looked at the results on the Tally Sheet in the vast majority of these precincts, and they don't tally.

66 Q You are talking about you have looked as a member of the Election Board of Marion County in this election?

A That is correct.

67 Q And you state to the Court—as a matter of fact, not as a matter of opinion—that they do not tally?

A That is right. The Canvassing Board—all in Mr. McClure's office went through. We asked our staff to pull out all of those which did not—apparently had some kind of calculative error or some problem, and we looked at every one of them. And they do exist, yes.

68 Q Now, turning your attention to your experience as a lawyer and having worked in these cases: Have you ever perused any of the Indiana Supreme Court opinions?

A I have.

69 Q In recount cases?

A I have.

70 Q Have you ever noted in those opinions any

[Tr. P. 41]

reproductions of ballots?

A Yes. It is rather common practice to reproduce: the checkmark versus the "X". What is a checkmark; what isn't a checkmark? What is an "X"? What is an estraneous mark? What is an identifying mark? All of these things have been reproduced, and the Supreme Court itself has actually made judgments as to what to accept and what to reject as a ballot.

71 Q Now, based upon all your testimony, based upon your experience, based upon your experience as

an Election Commissioner, and based upon your experience having actually gone through a recount and your thirteen years' experience in elections: is it possible in Marion County, wherein paper ballots are cast in an absentee fashion, for a recount commissioner to open those bags and make a simple arithmetical computation of votes as they were counted by the Election Board?

A Absolutely—

MR. TINDER: If it please Your Honors, we object to this question because, first of all, it calls for expert opinion. We do not believe that the witness has been properly qualified by proof of expert experience to qualify as such in order to

[Tr. P. 42]

answer a question calling for expert testimony. He has recited solely his participation as a recount commissioner in one case involving the election of County Councilman in 1966 as his sole factual basis of what his opinions are, from his general knowledge of how the ballots are registered and preserved in bags after the election. We do not believe a single actual experience is sufficient to qualify him either as a technical or practical expert, an expert in fact, for the purpose of giving expert testimony. Moreover, the Court will recall that, in giving his qualifications, the Court asked him about his examination of court cases. They are in effect calling upon him for a legal opinion, which is really attempting to substitute this witness's opinion—and he is an

admired lawyer in our community, but, nevertheless, this is not the way to make a legal argument to your court. So we submit, Your Honor, they have not qualified this witness, and it is improper.

MR. DILLON: Your Honor, may I be heard on this?

JUDGE STEVENS: Yes.

MR. DILLON: We did not qualify Mr. Kelley

[Tr. P. 43]

on an isolated case. We qualified him on his total experience and his knowledge of the parapheranalia.

The leading case I can find on it is Bridger v. Union Railway Company, 355 F.2d 382, supported by 287 F.2d 255, supported by Section 506 of Moore's Federal Practice, supported by Smith v. Hobart Manufacturing Company, 185 F.Supp. 751.

And here is what these courts have said in this regard. There are two tests regarding expert witnesses. First, is the subject matter not within the common knowledge of the average layman? Second, will the witness have such skill as to make it appear that his opinion would rest on substantial foundation and would aid the tryer of fact?

Now, I say here in this case the tryer of fact, which is Your Honors, could not possibly understand this paraphernalia, because I don't think any of us do until we get down and look at it. Here

is a man who has worked with it for 13 years. He's told you the actual physical condition of the ballots in the courthouse today, and he's told you how he bases his opinion that they cannot be recounted but they must be judged. And this is the essence of our lawsuit. The physical

[Tr. P. 44]

properties and the methods by which recounts are had in Indiana must be judgment calls and, therefore, must be contests and, therefore, must be reserved to the United States Senate.

JUDGE STEVENS: Mr. Dillon, are you arguing your case?

Will the reporter read the question.

(The reporter read the question, as follows: "Now, based upon all your testimony, based upon your experience, based upon your experience as an election commissioner, and based upon your experience having actually gone through a recount and your thirteen years' experience in elections: is it possible in Marion County, wherein paper ballots are cast in an absentee fashion, for a recount commissioner to open those bags and make a simple arithmetical computation of the votes as they were counted by the election board?")

JUDGE STEVENS: Mr. Kelley, let me first ask you: Do you have an opinion as to whether or not it is possible to do that?

WITNESS KELLEY: I do.

JUDGE STEVENS: Would you state your opinion.

WITNESS KELLEY: I do not believe it is possible to recount by—and open the bags without making judgments as to the validity of ballots or non-validity of ballots.

JUDGE STEVENS: And, counsel, we have

[Tr. P. 45]

overruled your objection, as you can tell. We think the objection goes to the weight of the evidence rather than admissibility.

MR. DILLON: You may cross-examine.

CROSS-EXAMINATION,

QUESTIONS BY MR. TINDER:

72 Q Mr. Kelley, do I understand correctly that you have only participated in one recount under the election laws of Indiana?

A That is correct.

73 Q Are you generally familiar with the statutes bearing upon recounts in Indiana?

A Generally, yes, sir.

74 Q Am I correct in stating that they provide, step by step, the duties of the recount commissioners, if they are appointed by a court of jurisdiction?

A I believe that they do provide some guidance, but I think the commissioner—the Recount Commission looks to the Court for its guidance in what it is to do and looks to the order of the Court.

75 Q Isn't it purely statutory?—the procedures to be taken by the recount commissioners?

A The Court orders the appointment of the Recount Commission, and so appoints them. I am not argu-

[Tr. P. 46]

ing with your. I believe it is up to the Court to tell the Recount Commissioners what the Court wants and what precincts are being recounted and how to do it.

76 Q When you say "How to do it", this is what my question now goes to. Does the statute prescribe, step ty step, how the recount commissioners begin, proceed through, and render a result on the recount?

A Yes, sir, I believe it does.

77 Q Now, Mr. Kelley, did you serve willingly on the board—the Recount Commission appointed in 1966 to which you refer?

A Not really.

78 Q You were an involuntary member, so to speak, then?

A It took a great deal of time, and time which I could not afford, and I was not paid for it.

79 Q And, as a result, you feel a little prejudiced to the system, then?

A I don't feel prejudiced either way.

80 Q I see. Now, you have recited to the Court how the records are made by the precinct election board and then transmitted to the City-County

Building, where they are to be totalled by both an unofficial and official canvassing board under the supervision of the Marion County Election Board, of which you are a member; am I correct?

[Tr. P. 47]

A Yes—with one correction. Under the supervision of the Marion County Canvassing Board. The Canvassing Board actually runs the canvass.

81 Q You are a member of that board?

A I am, sir.

82 Q I believe you stated that mistakes are made in the precincts by the election officials, like the inspector and the clerks?

A Yes, sir.

83 Q And I believe you said that there had been frequent mistakes made in the tallies sent in on the report which is signed by the officials of the precinct election boards. Am I correct?

A If you mean mistakes in the total number of votes reported, I don't know about that. I know that there have been mistakes as to the method by which the vote is reported. They are instructed to do certain things, and there have been mistakes as to how they have done those things. Those are the mistakes I speak of.

84 Q Has your experience shown you that these mistakes made by precinct boards or members thereof result in wrongful totals on their total sheets that they send in certified to by two clerks of the precinct?

[Tr. P. 48]

A Two ways. One, as to machines, the experience we had in recounting where I was recount commissioner, there was no mistake on any of the machines—not one vote difference on the machine reports. But as to paper ballots, there are differences of opinion of what should be counted and what should not be counted. And if you call that a mistake, then I guess that is a mistake.

85 Q Have you found that very frequently they were improperly marked?

A The ballots?

86 Q Yes, sir.

A Yes, sir.

87 Q Paper ballots?

A Yes, sir.

88 Q Do you consider in your experience that the proper total of these absentee paper ballots, along with the checking of the results on the machine. is precisely the method which was the object of the legislative intent in the present recount statutes of Indiana?

MR. DILLON: Objection. The legislative intent would be a question of law.

[Tr. P. 49]

JUDGE STEVENS: May I hear the question?

(The reporter read the last preceding question.)

JUDGE STEVENS: We will overrule the objection.

A I wasn't a member of the Legislature. I really don't know what the Legislature intended. I can only tell you what's been done in the past, what the practice has been—

89 Q Tell us—

A (Continuing)—and what would be necessary to do the job.

90 Q Are you saying that the recount commissioners do recheck these absentee ballots if they do their job under the statute?

A I am saying that to recount you would have to open the bags, open the ballots, look at them and make judgments about their validity, yes, sir.

91 Q Isn't that what the present recount statutes provide as a part of the steps for the recount?

A I believe—I really would like to see the statute you are referring to. I am sorry.

MR. DILLON: May I show it to him, Mr. Tinder?

MR. TINDER: Certainly.

[Tr. P. 50]

A Well, sir, I don't believe that is that clear. There is a question in my mind. It would be possible to have a recount which would be a retabulation of the Tally Sheets, which would be a strictly numerical thing, without ever looking at the ballots or opening the bags—in other words, going

through and making sure the Canvassing Board did its job properly and did report what was on the precinct Tally Sheets. It would be possible to recount on that basis.

JUDGE STEVENS: Mr. Kelley, which procedure did you follow?

WITNESS KELLEY: We used the judgment procedure.

JUDGE STEVENS: You thought that was in accordance with the statute?

WITNESS KELLEY: We were instructed by the Court to do that, yes, Your Honor.

92 Q The spelled-out provision of the recount statute under which you have testified as an expert—does it provide that the recount is of the precinct count made by the board in the individual precinct?

A Yes, sir. And I think that could be read to just looking at this. (Witness indicated instrument.)

[Tr. P. 51]

93 Q I will ask you if you had experiences where they simply didn't count correctly on these absentee ballots, as well as counting ballots which should not have been counted?

A As I say, it is hard to tell. When you look at the absentee ballots, it is not always clear as to whether they have been counted or not. That is not clear. And I don't know whether to call that a mistake or not.

94 Q At least, they are not tallied correctly; am I correct?

A I don't know whether they are tallied correctly or not, because I don't know what judgments the precinct election board made.

95 Q And your answer would apply to all—How many precincts are there in Marion County in this last election?

A Approximately six hundred.

96 Q Would your opinion be the same as to whether there might or might not be mistakes on the tallies in the votes on the last election on any office of the United States Senate?

A Again, if you mean mistakes as to what ballots are judged valid and what are not?

97 Q Yes, sir.

[Tr. P. 52]

A (Continuing) I believe there would be mistakes on that basis.

98 Q You believe there are mistakes; am I correct?

A Now, sir, please—

99 Q Is it a mistake if they count a ballot that is too mutilated to be counted, or not properly marked?

A If that is your definition of a mistake, then that would be a mistake, and my opinion would be that there will be cases of that.

100 Q Can you in any way assure this Court, from your personal knowledge, that such mistakes in the count of paper ballots do not exist in any of the nearly 600 precincts that you have recited took part in this Marion County election in November?

A Do not exist?—no, I Cannot assure the Court that.

101 Q Did you have various reports on Election Day that certain officials of precincts did not even show up?

A Yes, sir. And, in my recollection, I have never seen an election where we haven't had such reports.

102 Q Did you have various reports of machine breakdowns in various precincts?

A We did. Nor have I ever seen an election in this county that that hasn't occurred.

103 Q Did you have any reports from voters with respect to their votes not being counted or tallied, made to you as a member of the Canvassing

[Tr. P. 53]

Board?

A You mean that they went in and tried to vote and the machine didn't function?

104 Q Yes.

A Yes. Yes, sir.

105 Q In other words, by your testimony on direct examination, you did not intend to tell this Court in any manner that there may not be mistakes in the totals of the votes cast for either candidate for United States Senate in the nearly 600 precincts in Marion County the last Election Day, did you?

A I did not intend to tell the Court that, and I didn't think I did.

106 Q However, we understand correctly, by your personal experience in the 1966 councilmanic election, you felt that your personal services could have been employed better elsewhere, if we understand you; am I correct?

A I had wished they would have been, yes.

107 Q And you feel a little against the recount procedures generally on account of that personal experience?

A No, sir, I do not.

MR. TINDER: Thank you.

JUDGE STEVENS: Do you have any redirect?

[Tr. P. 54]

MR. DILLON: Yes, just a few questions.

REDIRECT EXAMINATION,

QUESTIONS BY MR. DILLON:

108 Q Maybe I missed a characterization of your testimony. But you feel that in the paper ballots there will be mistakes; is that not correct?

A If you define a mistake—

109 Q As Mr. Tinder defined it.

A Yes, there will be.

110 Q And you have testified, in your opinion, that those mistakes may have been counted and probably were counted in some precincts by the election board in that precinct?

A I believe, yes, that is my opinion.

111 Q So the essence of the problem, the question I direct to you is: When you get to the paper bag, is there any way, when you look in there, you can make simply a mathematical recomputation without making a judgment call, to determine how it was counted in the precinct?

A No, sir.

112 Q All right. Now, directing your attention to the law book you have got in your hand, Mr. Kelley —or statute, and tell me if you see any place in

[Tr. P. 55]

there, in this statute which Mr. Tinder questioned you about, anything where the commissioners are instructed as to how to handle paper ballots?

A No, I do not.

113 Q As a matter of fact, there is no specific law instructing the commissioners how to count paper ballots, is there?

A To my knowledge, there is not.

MR. DILLON: All right.

JUDGE STEVENS: Mr. Dillon, do you contend they were handled improperly on the recount that your witness testified about?

MR. DILLON: That, plus the theory, you see, that there is no way you can make a mathematical computation on the ones you get back in the bags.

JUDGE STEVENS: In other words, the testimony was that the recount you condemned was improperly conducted?

MR. DILLON: No, no. It is the basis of this man's experience that when you get to this paper bag and you try to make a mathematical computation, you cannot do it without making a judgment call, and that becomes a contest.

JUDGE STEVENS: What I am trying to

[Tr. P. 56]

find out: Is it your position that the recount the witness described was performed in accordance with the statute?

MR. DILLON: It is my position that is only to let the Court know the basis on which he renders his opinion—to build up his expertise to render his opinion. I had the paraphernalia so the Court can see what heppens when a recount starts.

JUDGE STEVENS: I don't think you have answered my question. I'd like to know Counsel's position. Do you contend the recount procedure the witness described was done in accordance with the statute or not?

MR. DILLON: I make no comparison with the Cottingham case. I am trying to show how things are done and why they are done that way and how, in this man's opinion, this one will be done. The simple fact is that when you get into that paper bag on the ballots to reconcile it with the numbers, you have to make a judgment call, and

I think that is what we have established with this witness.

JUDGE DILLIN: Is it your position, Mr. Dillon, that the recount statute is vague and

[Tr. P. 57]

indefinite on its face, because it does not tell the commission how to conduct the recount?

MR. DILLON: Yes, sir.

JUDGE DILLIN: And, therefore, it may necessarily vary from county to county according to the judgment call of the individual judge who appointed the recount commission?

MR. DILLON: As does and is done in the Reports of the Supreme Court, wherein the ballots are fixed so that they start out with a recount and it becomes a judgment call.

JUDGE DILLIN: Yes, but you are wandering off again.

MR. DILLON: I am sorry.

JUDGE DILLIN: Getting back to the very mechanics of conducting the recount, Mr. Kelley has suggested, as I understand it, that one way to verify the vote by a purely mathematical process would be to simply compare—

MR. DILLON: Take——

JUDGE DILLON: Quit interrupting.

MR. DILLON: I beg your pardon.

JUDGE DILLIN: (Continuing)—simply compare the totals as given on the Tally Sheets and the Certificate of Memoranda with those actually recorded in the Clerk's office or whatever perma-

[Tr. P. 58]

nent record is kept, without going into the ballots. He has also suggested that the other way to do it, the way with which he is familiar—done pursuant to direction of a judge—is to actually go into the ballots and make judgment calls.

Now, is it your position that since the statute doesn't say how to do it, that it could be done either way, depending on the discretion of the judge?

MR. DILLON: That is our position, Your Honor.

JUDGE DILLIN: And, therefore, could vary from county to county?

MR. DILLON: And I verily believe it will vary from county to county, yes, sir. And I also believe that the order of the Court which we have introduced into evidence opens up this very question. It does not confine it to that which Your Honor has been described, a pure mathematical recomputation, because it impounds the paraphernalia, et cetera.

JUDGE DILLIN: It really doesn't say how to do it, does it?

[Tr. P. 59]

MR. DILLON: No, sir.

JUDGE STEVENS: Are you through, Mr. Dillon?

MR. DILLON: No, sir.

REDIRECT EXAMINATION CONTINUING,

QUESTIONS BY MR. DILLON:

114 Q Mr. Kelley, in Mr. Tinder's cross-examination he made reference to the fact that mathematical errors have been made in the tabulation even by your two groups of people. And you conceded that, of course, there are. Is there not a provision within the statute for correcting those errors?

A Yes, sir.

115 Q I will hand what's been introduced as "Plaintiff's Exhibit 7" and ask you to tell the Court what that exhibit is, if you know.

A Yes. This is a certificate of a corrected result in the 1970 general election of Marion County.

The statute provides that—I am trying to recall the number of days, but, anyway, after the first certificate is given, there is a provision for the Canvassing Board to issue a correction. In fact, it is the Clerk of the Circuit Court that issues the correction.

[Tr. P. 60]

116 Q That is exactly what was done with reference to Exhibit 7, is it not?

A Yes, sir.

117 Q In Marion County?

A Yes, sir.

118 Q A mathematical correction was made by the Canvassing Board and sent to the Secretary of State; is that not correct?

A That is correct.

119 Q And that is what that exhibit reflects?

A That is what that exhibit is, yes, sir.

MR. DILLON: All right. That is all I have, Your Honor.

MR. HAMACHER: I have a few questions.

JUDGE STEVENS: All right. The Court would like to put a couple of questions first, if I may. Mr. Kelley, this suggested arithematical, simple procedure that you said would be possible —in your experience with elections in Indiana, have you encountered the use of that recount procedure before?

WITNESS KELLEY: No, sir, because—

JUDGE STEVENS: Well, I just wanted to know whether you had.

[Tr. P. 61]

WITNESS KELLEY: No, sir.

JUDGE STEVENS: Also, I understood you to say that there were judgments made by the precinct election boards; is that correct?

WITNESS KELLEY: Yes, sir.

JUDGE STEVENS: Are you referring to judgments as to which envelope to put the ballots in, in the first instance?

WITNESS KELLEY: As to whether a ballot was validly cast or was invalid, yes, sir.

JUDGE STEVENS: Would they fall into the category you described as "judgment calls"?

WITNESS KELLEY: Yes, sir. And, also, as to whether a person was a properly qualified voter or not. They would have to decide that at the precinct level, too.

JUDGE STEVENS: Then, those judgment calls are judged by the Recount Commission if it makes its own evaluations?

WITNESS KELLEY: That is correct.

JUDGE STEVENS: And is it your testimony, then, if it went to Court, this would be reexamined

WITNESS KELLEY: Yes, sir.

[Tr. P. 62]

RECROSS-EXAMINATION,

QUESTIONS BY MR. TINDER:

120 Q Mr. Kelley, on redirect examination, Mr. Dillon asked you whether there are any rules to provide how a judgment shall be—what shall be the basis of a judgment made on the recount, and you replied in the negative. Am I correct?

A I don't recall that being his exact question. I am familiar with the statutes that provides a means by which—or attempts to define how you should count paper ballots. Yes, sir, I am familiar with that.

121 Q And would that statute be followed by the recount commissionrs as the only way to count paper ballots under the law?

A I would certainly hope that they would follow it.

122 Q You were a recount commissioner. Did you follow it?

A You didn't ask me about my specific case. We did, sir.

But the one thing that statute doesn't do and the one problem is the identifying marks—what is an identifying mark and what isn't. And the statute doesn't change that, and the law as to identifying marks on ballots has not been changed by that. You try to establish the intent of the voter

[Tr. P. 63]

as best you can. But if the secrecy of the ballot has been violated, then you have got a completely new field of law to worry about. And that statute does not change those cases. At least, that was the position that the Recount Commission that I served on took.

123 Q Are you referring to that part of our election laws which is titled "Burns Revised Statutes, 29-5218"?—which shows how paper ballots must be marked to be effective.

A Yes, sir.

124 Q And that statute, which is a part of the same Election Code which provides for a recount method, specifies eight rules of how paper ballots

shall be marked by the voter to be a valid one; am I correct?

A Yes, sir.

125 Q If we understand you correctly, the only thing that isn't clear is how they make the identifying marks?

A The problem comes up in Rule 7 and 8, and if I might: ". . . Provided, however, any part of a ballot from which it is impossible to determine the elector's choice of candidates, shall not be counted as to the candidate, or candidates, affected thereby." There is the one problem you

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invariably run into.

The other is: "Any ballot on which an elector shall write his name, initials or a number or special symbol such as a star, circle, parallel lines, circle, dots, or any combination thereof shall be void."

Deciding what is a special symbol and an identifying mark is still within the purview of the election board in the precincts when they count the ballots. And in the Recount Commission which I served on we made those judgments again, substituted our judgment for the precinct.

126 Q And if we understand you, then, if the members of the Recount Commission are in disagreement on any single judgment of a vote cast, they take a majority vote, which shall control at that point, which is then subject to review by the appointing

court and, also, by the courts—the Appellate Courts of this state; am I correct?

A Yes, sir.

JUDGE STECKLER: In that regard, Mr. Kelley, does the machine mechanic exercise a judgment in regard to counting of an absentee paper ballot?

WITNESS KELLEY: I believe so, sir. I

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know that he is to sign the report, the certificate of the election—the Recount Commission, and he signs it, which is certified, then, to the judge of the court. In the case I was in, he did participate in those decisions, yes, sir.

JUDGE STECKLER: And one of the recount commissioners in the instant matter is a machine mechanic; is that correct? Do you know?

WITNESS KELLEY: No, sir, I do not know.

JUDGE STECKLER: My point is whether he is familiar with the election law to the extent that we are discussing the matter in depth here?

WITNESS KELLEY: No, I would say, in my experience, he was not. He was very familiar with the machines and very helpful in dealing with the machines and in opening the machines and in recounting them. But as to the election law and making these judgments, no, sir, he was a layman.

JUDGE STECKLER: Is there any provision in the Election Code that requires that one

member of the Recount Commission be a machine mechanic?

WITNESS KELLY: Yes, sir, I believe that is so.

MR. HAMACHER: I just have a few questions, where I think the constitutionality of the

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statute might be involved.

RECROSS-EXAMINATION CONTINUING,

QUESTIONS BY MR. HAMACHER:

127 Q Mr. Kelley, you referred to judgment calls. Where the Recount Commission exercises judgment, am I correct in assuming that this is only where there is something irregular?

A Yes, sir. Where the ballot is not clear as to the voter's intent.

128 Q Now, are there a lot of these in each precinct?

A No, not a lot. I couldn't characterize it as a lot.

JUDGE DILLIN: Well, how many?

WITNESS KELLEY: I would say that, in the recount we did, there were very few precincts that didn't have one or more of these situations in, yes.

129 Q Running up to what? One or more?

A In the case that I recounted, in the limited number of precincts—in approximately 30 precincts which we recounted in Marion County, I believe there were somewhere in the neighborhood of two

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hundred ballots which question was raised about. I am not saying two hundred of them were changed, but there was serious question about two hundred of them.

130 Q Judgment was required on those?

A Yes, sir.

131 Q You were recount commissioner in a contest, weren't you, for a sub-office or subdivision of the State?

A Yes, sir. It was characterized as a recount contest, yes, sir.

132 Q And in such a contest, under our statutes, the recount commissioners do exercise judgment, don't they? They are required to?

A That is my opinion, yes. Well, it is not clear in the statute, but it is my opinion that you'd have to.

133 Q There is no legislative body that is going to act as final arbiter? The courts are the arbiter?

A Other than the Legislature, yes, sir.

134 Q The Legislature doesn't determine the question involved where a County Commissioner—was it a County Commissioner?

A No, sir, I didn't mean to imply that. No, sir, it is the courts which are the final arbiter.

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135 Q And the court is required in those cases to make a judgment?

A That is absolutely true.

136 Q Have you been a recount commissioner in a case involving a legislative election?

A State legislative election, no, sir.

137 Q Or for a Congressman or Senator?

A No, sir, I have not.

138 Q Mr. Kelley, wouldn't it be perfectly possible to —instead of making the judgment calls you have referred to, to set aside everything that is questionable, along with any changes in your recount, and forward those to the United States Senate for their determination?

A I suppose that would be possible, sir. I don't know what authority a recount commission would have to forward it to the United States Senate.

139 Q Statutory authority?

A As a recount commissioner, when I served, I served under the authority of a Superior Court of Marion County.

140 Q Which was perfectly proper and where judgments were required by the statute?

A Yes, sir.

141 Q Now, if you had been exercising your recount

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commissioner's authority in a case involving the Legislature of the State of Indiana, what would you have done with those items that required judgment?

A Sir, it was my understanding that the Legislature recounts legislative cases and not—and this procedure, the judicial procedure, would not apply. At least, I think that is right.

142 Q As to judgment calls?

A Yes, sir.

143 Q You would certify whatever you found to the Legislature, the proper authority for its determination; is that correct, Mr. Kelley? You may check the statute on that.

A Well, I don't believe that that is the procedure. I think that the Legislature itself recounts. I mean that is my remembrance of the law. I would ask privilege to look it up and change it.

144 Q Go right ahead. Check the statute which states what you do when the court is dealing with a legislative—

MR. DILLON: Question of law, Your Honor.

JUDGE STEVENS: Mr. Hamacher, we will listen patiently to your argument on the law.

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MR. HAMACHER: It is my purpose, Your Honor, to show that the procedure described by the witness properly applies to a state office other than the Legislature or Governor or Lieutenant Governor.

JUDGE DILLIN: Do you know of any situation, Mr. Hamacher, where the Supreme Court of this state has permitted a court-appointed Recount Commission to recount—

MR. HAMACHER: No.

JUDGE DILLIN: As a matter of fact, has it not permitted that done in three separate cases?

MR. HAMACHER: As a pure discovery matter. We don't have a decision.

JUDGE DILLIN: Then, what is the point of your question if we all know as a fact it's never been permitted or done?

MR. HAMACHER: Because the statute provides that the results of the recount will be certified to the proper authorities.

JUDGE DILLIN: Okay. You can argue that.

MR. HAMACHER: Do I understand that the Court doesn't want to hear any more or permit any further questions?

JUDGE STEVENS: I feel it is a legal argu-

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ment. We will listen to your argument.

JUDGE DILLIN: How about two or three questions, Mr. Kelley? On your direct examination, did I understand you to say that the precinct election boards—or that the inspector of each election board was appointed from the party which carried the largest vote for Secretary of State in the county in the last general election?

WITNESS KELLEY: No, sir, that is not correct. I said that, and that is not correct.

JUDGE DILLIN: What is it?

WITNESS KELLEY: It is the largest number of votes for the office of Secretary of State in the State.

JUDGE DILLIN: So all the inspectors were members of the same political party?

WITNESS KELLEY: That is correct.

JUDGE DILLIN: As a member of the Canvassing Board and having seen these ballots in the Clerk's office, can you give us some idea as to approximately how many paper ballots there are in these envelopes from the precincts which the Superior Court action seeks to have recounted?

WITNESS KELLEY: Yes, sir. I think in the counted, there's somewhere in the neighborhood

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of 6,000 ballots. And the uncounted, I have no idea.

JUDGE DILLIN: Well, based on your previous experience, can you give us some approximation of the ratio of uncounted to counted ballots?

WITNESS KELLEY: Yes, sir, I could, in fact, because I believe that there were about 7500 absentee ballots cast, and if there were counted around 6,000, that would, by simple arithmetic, make about 1500 treated as uncounted.

JUDGE DILLON: Are you talking about 7500 in the county as a whole, or specific wards and precincts?

WITNESS KELLEY: No, sir—in the county as a whole. I have no idea on the specific wards and precincts.

JUDGE DILLIN: So, on the county as a whole, you are correcting your testimony to say about 7500 were cast and about 6,000 counted?

WITNESS KELLEY: That is correct.

JUDGE DILLIN: And you don't know where the contests were that the State Court action is seeking to have recounted?

WITNESS KELLEY: I do not, sir.

JUDGE DILLIN: That is all.

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JUDGE STEVENS: Any other questions?

RE-DIRECT EXAMINATION,

QUESTIONS BY MR. DILLON:

145 Q Mr. Tinder had reference in his cross-examination to the statute which specifies what is and what is not a proper paper ballot; is that correct?

A Yes, sir.

146 Q He called your attention to it?

A Yes, sir.

147 Q Following the mandate of that statute and then looking in that bag where the counted ballots from the precincts are located—if you followed the mandate of the statute, would you have to make a judgment call to reconcile what the precinct election board did?

A Yes, sir.

148 Q There is no way you could reconcile the mandate of the statute with the actual votes in the bag?

JUDGE DILLIN: I think that point has been made five or six times.

MR. DILLON: All right. One last question.

149 Q Were you aware that there are several counties in the State, Mr. Kelley, wherein only paper

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ballots are used?

A Yes, sir.

150 Q Were you aware of how the vote is cast in Wayne County, Richmond, Indiana?

A Yes, sir. It is a paper ballot county.

151 Q The entire county is cast on paper ballots?

A Yes, sir.

MR. DILLON: Thank you.

That is all I have, Your Honor.

JUDGE STEVENS: Any other questions?

Thank you, Mr. Kelley.

WITNESS KELLEY: Thank you, Your Honors.

(WITNESS KELLEY EXCUSED)

JUDGE STEVENS: The Court will recess for about ten minutes, and then we will hear your final arguments.

(The Court was thereupon in recess at 11:50 a.m. on December 17, 1970, at the conclusion of the evidentiary portion of the trial.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970.

70-66

No. 1232

RICHARD L. ROUDEBUSH,

Appellant,

vs.

R. VANCE HARTKE, SAMUEL WALKER, JOHN R. HAMMOND, DUGE BUTLER AND THEODORE L. SENDAK, ATTORNEY GENERAL OF INDIANA,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

JURISDICTIONAL STATEMENT.

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Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF INDIANA, INDIANAPOLIS DIVISION.

JURISDICTIONAL STATEMENT.

Appellant appeals from the order of the United States District Court for the Southern District of Indiana, sitting as a three-judge court under 28 U. S. C. § 2284, granting, after notice and hearing, an interlocutory injunction restraining appellant and others from taking any action whatsoever under and pursuant to the provisions of Burns' Indiana Statutes §§ 29-5401 through 29-5417 to conduct a recount for the office of United States Senator for the State of Indiana in Marion County, Indiana, or elsewhere, pending the determination of the action.